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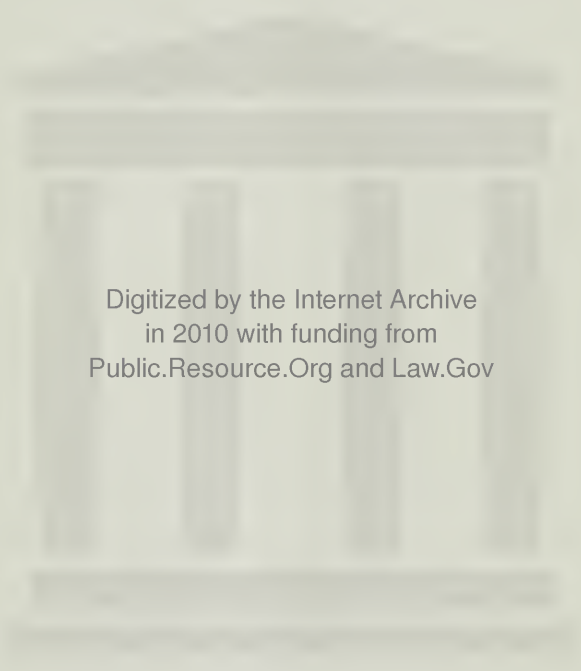
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No. 14996

**United States
Court of Appeals**
for the Ninth Circuit

HAROLD L. WARD, et al.,

Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 420)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APR 19 1956

No. 14996

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavits of:	
Fleckner, S. L.	65
Harvey, Ernest	74
Amendment to Cross-Complaint on Its Face ...	128
Answer to Complaint, First Amended	129
Answer and Cross-Complaint	36
Ex. A—Modification of Agreement	52
B—Notices of Default	54
C—Notice of Default	63
D—Letter Cancelling Agreement	64
Answer to Cross-Complaint	100
Answers to Interrogatories	104
Appeal:	
Certificate of Clerk to Record on	183
Designation of Contents of Record on (U.S.D.C.)	182
Notice of	181
Statement of Points to Be Relied Upon on	999
Stipulation as to Printing of Record on ..	1001
Certificate of Clerk to Record on Appeal	183

INDEX	PAGE
Complaint	3
Ex. A—Agreement	10
Ex. A—Timber Deed	25
Ex. A—Letter Re Quitclaim Deed	33
Complaint, First Amended	114
Counsel, Names and Addresses of	1
Designation of Contents of Record on Appeal (U.S.D.C.)	182
Engrossed Findings of Fact and Conclusions of Law and Interlocutory Decree	153
Findings, Conclusions, Judgment and Decree ..	170
Interrogatories of Defendants and Cross-Com- plainants to Plaintiff and Cross-Defendants .	81
Ex. A—Agreement	90
B—Notice of Default	91
C—Notice of Default	93
D—Notice of Default	94
E—Notice of Default	96
F—Notice of Default	97
G—Notice of Default	99
Notice of Appeal	181
Notice of Motion for New Trial and to Amend Findings and Conclusions	176
Opinion	138
Order Denying Defendants' Motion for New Trial and to Amend Findings and Con- clusions	179

INDEX	PAGE
Order Directing Clerk to Execute Grant Deed . .	180
Order Directing Deposit of Funds With Clerk.	166
Order Re Exhibit Upon Hearing on Settlement of Findings	178
Order Fixing Defendants' Damage Pursuant to Paragraph 2 of Interlocutory Decree	162
Statement of Points to Be Relied Upon on Ap- peal	999
Stipulation as to Printing of Record and Re- lated Matters	1001
Transcript of Proceedings	188
Oral Argument	994
Witnesses, Defendants':	
Fletcher, Lawrence S.	
—direct	802
—cross	860, 870
Kilpatrick, Frank C.	
—direct	879
—cross	911
Ward, Harold L.	
—direct	929
—cross	981
Wilson, A. K.	
—direct	926

	INDEX	PAGE
Witnesses, Plaintiff's:		
Brozovich, John		
—direct		769
—cross		775
Bunting, Charles H.		
—direct		433
—cross		478
—redirect		483
Carr, Silas B.		
—direct		737
Cobb, W. L.		
—direct		718
—cross		727
Fleckner, Stanley L.		
—direct		416
—cross		423
—redirect		430
French, William W.		
—direct		280
—cross		298
Harvey, Ernest G.		
—direct		392
—cross		408
—redirect		411
—recross		414

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Lane, Ernest E.

—direct 739

—cross 745

Owens, Paul C.

—direct 302

—cross 320, 364, 489

—redirect 518

Trotter, James

—direct 751

—cross 759

Waldkirch, Waldo

—direct 763

Ward, Harold L.

—direct 189, 203, 264

—cross 272

—redirect 278

—recross 279

Wilson, A. K.

—direct 524

—cross 587, 606, 662

—redirect 694

—recross 715

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In the United States District Court for the
Northern District of California, Southern Division

No. 33618

UNION BOND & TRUST COMPANY, a Corporation,
ration,

Plaintiff.

vs.

BLUE CREEK REDWOOD COMPANY, INC.,
HAROLD L. WARD, FREDERICK S.
STRONG, JR., MARJORIE W. STRONG,
VIRGINIA PALMER WARD, Wife of Harold Lee Ward, FREDERICK S. STRONG,
3RD, JOHN W. STRONG, MARJORIE
STRONG RUSSEL, ROSAMOND ANNE
STRONG PETERS, VIRIGINIA PALMER
WARD, Daughter of Harold Lee Ward and
Virginia Palmer Ward, ELIZABETH
PALMER WARD, ANN WARD, FIRST
DOE, SECOND DOE, THIRD DOE, FIRST
ROE COMPANY, a Corporation, SECOND
ROE COMPANY, a Corporation, and THIRD
ROE COMPANY, a Corporation,

Defendants.

COMPLAINT

Comes Now Union Bond & Trust Company, a corporation, the plaintiff above named, and for cause of action against defendants, and each of them, shows as follows:

I.

Plaintiff Union Bond & Trust Company was, at all times mentioned herein, and is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

II.

Defendant Blue Creek Redwood Company, Inc., was, at all times mentioned herein, and is a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California.

III.

Defendants Harold L. Ward, Frederick S. Strong, Jr., Marjorie W. Strong, Virginia Palmer Ward, John W. Strong, Marjorie Strong Russel, Rosamond Anne Strong Peters, Virginia Palmer Ward, Elizabeth Palmer Ward and Ann Ward were, at all times mentioned herein, and are citizens and residents of the State of Michigan. Defendant Frederick S. Strong 3rd was, at all times mentioned herein, and is a citizen and resident of the State of Illinois.

IV.

Defendants First Doe, Second Doe, Third Doe, First Roe Company, Second Roe Company and Third Roe Company are sued herein by fictitious names for the reason that the true names of said defendants are unknown to plaintiff. Each of said fictitiously named defendants was, at all times herein mentioned, and is a citizen and resident

of a state of the United States other than the State of Oregon.

V.

The matter in controversy herein, exclusive of interests and costs, exceeds the sum of \$3,000.

VI.

On or about May 1, 1946, defendant Blue Creek Redwood Company, Inc., made and entered into with A. K. Wilson, that certain agreement dated May 1, 1946, wherein defendant Blue Creek Redwood Company, Inc., is named as Seller and A. K. Wilson is named as Purchaser, for the sale and purchase of certain land in the County of Humboldt, State of California, more particularly described in said agreement. A true copy of said agreement is attached hereto, marked Exhibit "A," and is incorporated herein as fully as though set forth at length. By assignment plaintiff Union Bond & Trust Company has acquired all the right, title and interest of said A. K. Wilson in and to said contract and said land. At all times since the date thereof said contract has been, and is now, in full force and effect. Plaintiff has performed all the terms and provisions of said agreement on its part to be performed. At all times herein mentioned plaintiff was, and now is, in possession of all of said land.

VII.

By assignment each of said persons named in paragraph III hereof claims to have acquired a fractional part of the right, title and interest of

said Blue Creek Redwood Company, Inc., in and to said agreement of May 1, 1946, and said land described therein. Defendants Harold L. Ward and Frederick S. Strong, Jr., were, at all times herein mentioned, and are the duly authorized and acting agents and attorneys-in-fact of each of the other defendants herein named.

VIII.

By the terms of said agreement, and by the terms of paragraph 12 thereof, it is provided that if purchaser be in default under any term or provision of said agreement, and if such default continue for a period of sixty (60) days after written demand by seller for performance by purchaser, seller shall have as its sole remedy the right to cancel said agreement. By the terms of said agreement seller cannot otherwise terminate or cancel said agreement or the rights of purchaser thereunder. On or about May 12, 1954, defendants and each of them, served on plaintiff what purported to be a notice of cancellation of said agreement and of the rights of plaintiff thereunder as purchaser. At said time plaintiff was not in default under any term or provision of said agreement for a period of sixty (60) days after written demand by defendants, or any of them, and said notice of cancellation was contrary to the terms of said agreement, and said agreement has not been cancelled or terminated and the same is now in full force and effect.

IX.

After said notice of termination, defendants, and each of them, asserted claims against said land contrary to the rights and interests of plaintiff, and have created a cloud against the title of plaintiff in and to said land. Said conduct of defendants, and each of them, has resulted in damage to plaintiff in an amount as yet unascertained. Plaintiff prays leave to amend this complaint to insert herein the amount of such damage at such time as the same can be ascertained.

X.

After said notice of termination, defendants, and each of them, by force and violence attempted to oust plaintiff of the possession of said property and did, on numerous occasions, restrain employees of plaintiff from entering on said property for the performance of their duties, and did induce the employees and agents of plaintiff to leave the service of plaintiff, and did induce contract carriers to leave the service of plaintiff and to breach their contracts with plaintiff, and attempted to induce persons indebted to plaintiff to refrain from paying such indebtednesses and did interfere with the business and operations of plaintiff on said land and otherwise, and said defendants conspired together to do each of said acts, and said acts were done and performed by defendants, and each of them maliciously and wrongfully, and with the intent to injure plaintiff in its business, all to the damage of plaintiff in an amount in excess of \$100,000, the exact amount of such damage being as yet unascertained.

Plaintiff prays leave to amend this complaint to insert herein the amount of such damage at such time as the same can be ascertained.

XI.

By the terms of said agreement plaintiff is the equitable owner of said land and property and is entitled to the possession thereof. Under said agreement legal title to said land and property is retained by seller as security only for the payment of the purchase price therefor. The total purchase price to be paid for the said property is the sum of \$750,000. Pursuant to the terms of said agreement and in payment of the purchase price thereunder, plaintiff has paid to defendants an amount in excess of \$600,000, and there remains unpaid approximately \$140,000. If any default of plaintiff under said agreement has continued for a period in excess of sixty (60) days after written demand by seller for performance, the same has resulted solely through inadvertence and excusable neglect, and plaintiff is ready, willing and able to forthwith remedy any such default. Plaintiff is ready, willing and able to perform said agreement in all respects, and to pay the purchase price for said property in full, and in accordance with the terms and provisions of said agreement. Defendants, by attempting to cancel said agreement and to terminate the rights of plaintiff in and to said property, have attempted to forfeit the rights and interests of plaintiff contrary to equity and good conscience and contrary to law. Any loss or damage suffered by defendants

as the result of any default of plaintiff found to exist under said agreement is nominal only and is without prejudice to the rights of defendants under said agreement, and can be adequately compensated for by an award of damages herein.

XII.

Said agreement of May 1, 1946, was and is in truth and in fact a mortgage and was intended by both the seller and purchaser thereunder to be a mortgage only, and to stand as security for the payment of the purchase price of said land, and to serve no other purpose. Defendants have no right, title or interest in or to said property except as mortgagees thereof. Defendants, and each of them, claims the right, title and interest in and to said property in addition to their rights as mortgagees, and each of said defendants denies any right, title or interest of plaintiff in and to said property. Said claims of defendants, and each of them, in and to said property, other than as mortgagees, are against the rights of plaintiff and are without foundation.

Wherefore, plaintiff prays that it be declared that said agreement of May 1, 1946, is in full force and effect, and that defendants, and each of them, be ordered and directed to perform said agreement of May 1, 1946, according to the terms thereof; that the title of plaintiff in and to said property be quieted as against any and all claims of defendants, and each of them, subject only to said agreement of May 1, 1946; that it be declared and adjudged

that plaintiff is the owner of said property and that defendants have no estate, right, title or interest in said property other than as mortgagees; that plaintiff have judgment against defendants, and each of them, for damages in an amount to be ascertained, and for its costs of suit incurred herein; and for such other, further and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Plaintiff.

Exhibit A

Agreement

This Agreement made this 1st day of May, 1946, by and between Blue Creek Redwood Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter called Seller, and A. K. Wilson, of Portland, Oregon, hereinafter called Purchaser.

Witnesseth

In consideration of the mutual covenants, agreements and stipulations hereinafter set forth and contained, the above parties agree to and with each other as follows:

1. Seller does hereby agree to sell and convey to Purchaser, and Purchaser agrees hereby to buy the following described real property, together with all standing and fallen timber thereon, situated in

Humboldt County, State of California, more particularly described as follows, and hereinafter referred to as said lands:

Township 11 North Range 2 East
Humboldt Meridian

Section 2.

SW $\frac{1}{4}$ of SW $\frac{1}{4}$

Fractional Section 3.

E $\frac{1}{2}$

NE $\frac{1}{4}$ of NW $\frac{1}{4}$

Section 11.

NW $\frac{1}{4}$

TOWNSHIP 12 NORTH RANGE 2 EAST
HUMBOLDT MERIDIAN.

Fractional Section 18.

SW $\frac{1}{4}$

Fractional Section 19.

N $\frac{1}{2}$

SE $\frac{1}{4}$

Section 29.

NE $\frac{1}{4}$

Fractional Section 30.

Entire.

Section 32.

W $\frac{1}{2}$

2. The purchase price for said lands is \$600,000.00, which said sum is payable as follows:

(a) \$10,000.00 upon the execution of this Agreement, receipt whereof is hereby acknowledged;

(b) \$15,000.00 on or before the 15th day of May, 1946;

(c) Minimum annual payments of \$40,000.00 payable May 15th of each year, commencing May 15th, 1947.

(d) Purchaser shall not have the right to cut or remove timber from said lands until the sum of \$65,000.00 has been paid on the purchase price. When Purchaser has paid said \$65,000.00 on the purchase price, he shall have the right to enter upon said lands with the right to cut and remove any and all timber from said lands, in accordance with the terms of this Agreement. As the timber is cut and removed from said lands the Purchaser shall make stumpage payments to the Seller on or before the 20th day of each month at the rate of \$5.00 per M feet for all timber cut and removed from said lands during the previous month.

(e) The Humboldt Scale shall be used for Redwood logs and the Spaulding Scale for all other species;

(f) The total purchase price for said lands must be paid on or before the 15th day of May, 1956. Purchaser shall have the privilege of paying the remaining balance due on the total purchase price for said lands at any time prior to said date.

3. When Purchaser has paid to Seller the total purchase price for said lands, Seller shall thereupon forthwith execute and deliver to Purchaser a Grant Deed and title policy insuring merchantable title to

the above described property. Purchaser hereby expressly waives the right to object to any exception based upon irregularities of survey, appearing in the certificate of title.

4. Purchaser agrees to pay for his own account, when due, all current taxes on said lands, commencing with the taxes for the fiscal year beginning July 1st, 1946, and shall mail to Seller either the tax receipts or photostatic copies thereof.

5. This Agreement is subject to a timber deed dated April 2nd, 1946, between Seller and G. L. Speier, a copy of which is attached hereto, made a part hereof, and marked Exhibit "A," wherein the Seller has sold to said G. L. Speier the fir, cedar, hemlock and spruce timber standing on certain of said lands to wit: the SE 1/4 of Section 19 and the entire fractional Section 30, Township 12 North Range 2 East, Humboldt Meridian.

6. In the event Purchaser permits a third person to use any right of way over said lands, or to construct, maintain or use a road over said lands, and receives therefor a cash consideration other than payments made as a proportionate share of maintenance of such road, such consideration shall be turned over to Seller by Purchaser and shall be applied toward the final payments of the purchase price herein. Any such rights of a third person shall immediately cease and terminate upon the cancellation of this contract or its termination, other than by full performance by Purchaser, in which event

all roads and materials used in constructing such roads, other than redwood planks, shall immediately become and remain the sole property of Seller.

7. Seller is now the owner of the following described real property, together with all standing and fallen timber thereon, situated in Humboldt County, State of California, and more particularly described as follows, to wit:

Township 12 North Range 2 East
Humboldt Meridian

Section 17.

NW 1/4

Fractional Section 18.

N 1/2

It is understood that Seller has offered to sell said real property to the United States of America, to be used for certain purposes, which said offer to sell will remain in effect until the 1st day of December, 1950.

In consideration of Seller's promise to Purchaser not to sell said real property to anyone other than the said United States of America, and in further consideration of the premises herein contained,

It Is Agreed that in the event the United States Government has not purchased said real property on or before the 1st day of December, 1950, and upon the further condition that this Agreement is then in full force and effect, Purchaser promises to buy and Seller promises to sell to Purchaser said

real property for \$150,000.00 payable as follows: \$25,000.00 on the 15th day of January of each year commencing the 15th day of January, 1951; and continuing until the entire sum of \$150,000.00 has been paid.

In the event of such sale to Purchaser the said real property shall from and after the 1st day of December, 1950, be included in this Agreement as part of "said lands." and be subject to all of the terms and conditions hereof.

In the event the United States of America has not purchased said real property by the 1st day of December, 1950, Seller will give written notice thereof to Purchaser on or before the 10th day of December, 1950.

8. Seller hereby gives to Purchaser the right to construct, maintain and use a road over the said N 1/2 of Section 18, and NW 1/4 of Section 17, Township 12 North, Range 2 East, Humboldt Meridian, upon the following conditions and subject to the following limitations and restrictions: •

(a) The road constructed over said real property shall be so constructed as to make the center line of such road conform to the preliminary survey staked by the United States Public Roads Administration, across said real property, as modified by such projections and off-sets as are found to be necessary by said United States Public Roads Administration;

(b) The right herein acquired from Seller to use, maintain and construct such road over said real property shall cease and terminate upon the purchase of said real property by the United States Government or upon the cancellation or termination of this Agreement other than by complete performance by Purchaser.

(c) Purchaser shall not have the right to sell, assign or lease a right of way over said real property, or in any other manner permit any third person to construct, maintain or use any road over said property without the written consent of Seller previously had and obtained.

(d) No timber is to be cut on said real property except within the construction limits of such road. The Purchaser shall pay Seller for any timber cut within the construction limits of such road at the rate of \$4.00 per M feet.

(e) Seller shall have the right to use said right of way over said real property and any road constructed thereon.

9. The Purchaser agrees that in cutting and removing the timber from said lands he will conduct his operations in strict conformity with all and singular the requirements and conditions hereinafter set forth:

(a) All merchantable timber on said lands shall be cut and logged or shall be paid for by the Purchaser as hereinafter provided and all such timber shall be logged clean as the work progresses, and

the Purchaser shall fall and buck such timber as is necessary to determine whether he is obtaining all of the timber which will make merchantable logs. For all such timber which is not logged in accordance with the plans herein and for any thereof which is abandoned in the woods, or elsewhere, or is destroyed or damaged by fire resulting from any act or omission of the Purchaser, agent or employee, or by any fire resulting from the operation of the Purchaser, whether through negligence or otherwise, the Purchaser shall and will, upon receipt of the Seller's scale report thereof, pay the Seller therefore at the rate of \$5.00 per M feet of timber, and in the absence of fraud or clear mistake, the Seller's statement and scale report shall in every instance be conclusive as to the amount of timber covered thereby and shall constitute the only demand necessary to render payment on account thereof immediately due and payable.

(b) The Purchaser shall prepare a general logging plan of each year's operations and road development and furnish a copy of such plan to Seller not later than May 31st of the year in question, and keep Seller currently advised of any significant changes in such plans.

(c) When logging operations are begun on any one setting, they shall be continued until all merchantable timber on said setting is cut and removed therefrom. Meanwhile, Purchaser's spar pole shall not be removed from that area. If the logging operations in such area are interrupted by inclement

weather, they shall be resumed and completed as soon as weather conditions permit.

(d) Stumps shall be cut so as to cause the least practicable waste.

(e) No unnecessary damage shall be done to young growth or to trees left standing. As far as practicable, all rigging shall be slung on stumps or on trees to be cut.

(f) During the time that this Agreement remains in force, the Purchaser shall independently do all in his power to prevent and suppress forest fires on the sale area and its vicinity, and shall require his employees, contractors, and employees of contractors to do likewise.

(g) Slash created by logging operations shall be disposed of with the least practicable amount of damage to trees left standing and in accordance with good forestry practices in the area. Slash shall be burned annually or as often as practicable according to weather conditions.

(h) The Purchaser shall keep all logging camps, mills, stables, and other structures on said lands, and the ground in their vicinity, in a clean sanitary condition, and rubbish shall be removed and burned or buried.

(i) All of said logging operations shall be conducted in good workmanlike manner and in accordance with the standard of the best logging practices obtained under similar conditions in the State of

California, and in the conduct thereof the Purchaser agrees to comply with and conform to all requirements of law now or hereafter during the term of this contract in effect relating to the operation of cutting, logging and removing of timber and the disposition of slash on cut-over land, and all other laws relating to or affecting such logging operations, and the Purchaser expressly agrees to exercise the highest degree of skill and care so as to minimize damage from fire or any other cause. The Purchaser also expressly agrees to comply with and conform to all sanitary laws, rules and regulations in effect at any time during the life of this Agreement for the protection of water supplies.

10. All logs shall be clearly branded before removal from said lands so as to be easily identifiable at all times as logs taken from said lands.

11. Monthly reports, including all hauling and scaling slips, of Purchaser's logging operations hereunder showing the length, diameter, footage and species of each log and the section from which removed, are to be supplied by Purchaser to Seller, and shall be forwarded with monthly payments. At any time Seller shall have the privilege of inspecting any or all of Purchaser's or Purchaser's subsidiary, affiliated or controlled companies' records pertaining to the cutting or removal of such timber from said lands.

All merchantable logs and all other logs removed by the Purchaser from said lands shall be scaled at the Purchaser's expense by a competent log scaler

mutually agreed upon between Seller and Purchaser.

All scaling shall be done in accordance with good scaling practices in the Redwood area, giving due consideration to the interests of Seller and Purchaser.

The scaler shall scale the logs at the small end on the average diameter inside the bark taken to the nearest inch, unless the Humboldt Scale for Redwood logs or the Spaulding Scale for other species of logs provides otherwise.

Said scaler shall number each log as mutually agreed between Seller and Purchaser and write the number and log scale on one end of each log with log crayon and make a corresponding record in writing of such scaling, signed by himself and the trucker hauling the logs. Monthly payments for logs cut and removed from said lands shall be made on the basis of this scale, but if a separate trucking scale is kept, Purchaser shall also furnish Seller currently a copy of such trucking scale for the purposes of comparing and checking.

If and whenever either the Seller or Purchaser becomes dissatisfied with said scaler for any reason, he shall be replaced by another competent log scaler who is mutually satisfactory to both the Seller and Purchaser.

The title to all timber included in this Agreement shall remain in the Seller until it has been removed from said lands, scaled and paid for.

12. If the Purchaser fails to pay any sums due Seller under this contract or shall fail to keep and perform any other covenant on his part to be kept and performed and such failure or default shall continue for a period of sixty days after written demand by Seller for such payment or performance, Seller shall have as its sole remedy the right to cancel this Agreement, resume possession of the property, retain all payments theretofore made by Purchaser to Seller and to recover from Purchaser all unpaid stumpage payments at the rate of \$5.00 per M feet for timber cut and removed prior to the Seller regaining possession of said lands. The Purchaser shall thereafter be barred from asserting any right, title or interest in or to this contract or to said lands or timber standing or fallen remaining thereupon. Said cancellation shall be deemed completed by sending to Purchaser a letter which said letter may be in the following form:

“You are hereby notified that Blue Creek Redwood Company, Inc., hereby cancels that certain Agreement dated wherein you are the Purchaser and the said Blue Creek Redwood Company, Inc., is the Seller of certain lands as are therein described.

“BLUE CREEK REDWOOD
COMPANY, INC.,

“By”

13. It shall be sufficient service of any notice from Seller to Purchaser, or vice versa, provided in

this Agreement, to send it by registered mail; and the address of Seller shall be, until written notice of another, Orchard Lake, Michigan; and the address of Purchaser, until written notice of another, shall be 923 S. W. 5th Avenue, Portland, Oregon.

Payments to be made to Seller under this Agreement shall be mailed to Seller at Orchard Lake, Michigan, or to such address as Seller may direct in writing from time to time.

14. Each and every provision of this Agreement shall inure to and be binding upon the successors and assigns of Seller and the successors, assigns, heirs, personal representatives or executors and administrators of the estate of Purchaser.

15. The place of this contract is in California and the interpretation, construction and enforcement thereof shall be governed by the laws of said State.

16. Upon execution hereof, all subsequent loss, destruction or deterioration of the timber upon said lands caused by fire or any other means shall fall upon the Purchaser; the Purchaser agrees to promptly discharge and to hold Seller harmless from any and all liens, claims and liabilities whatsoever, upon arising out of, or resulting from Purchaser's use of said lands, including the cutting and removal of timber therefrom.

17. It is understood by Seller that Purchaser may assign this contract to a partnership or corpo-

ration which shall thereupon be substituted as Purchaser in the place and stead of said A. K. Wilson, with the same force and effect as if this contract had originally been made with said partnership or corporation, said A. K. Wilson being thereupon discharged from any further obligation hereunder.

18. Purchaser shall have the right to log selectively in areas designated by Purchaser, upon the following conditions:

(a) The Seller shall be previously advised of the area to be selectively logged;

(b) The logging shall be in accordance with good selective logging practice in conformity with a program previously approved by Seller in writing.

19. Time is of the essence.

By accepting payment of any sum after its due date, or by waiving a failure of Purchaser to perform any other obligation or covenant on his part to be performed, under the terms of this Agreement, the Seller does not waive its right either to require prompt payment when due of all other sums due under this Agreement or to declare a default for failure so to pay such sums or perform the other obligations and covenants on Purchaser's part to be performed.

20. Purchaser may credit any accumulated excess of payments, if any there be, over the required annual minimum payments, as set forth in para-

graph 2, to any subsequent required minimum payment provided, however, that at the time Purchaser credits such excess payments he has paid in full for all timber cut and removed from said lands at the rate of \$5.00 per M feet, and provided further that such excess payments cannot be used to pay for any timber cut and removed from said lands.

In the event Purchaser uses such excess payments as above set out he shall render a proper accounting therefor.

Purchaser may make payments on the purchase price in addition to minimum annual and stumpage payments required herein and may apply such advanced payments to any stumpage or minimum annual payments thereafter becoming due.

21. Purchaser may enter upon said lands (excepting Section 18 and Section 17, Township 12 North Range 2 East, Humboldt Meridian) prior to the payment of \$65,000.00 on the purchase price for the purpose of constructing roads upon the following conditions only:

(a) No timber is to be cut except within the construction limits of said roads;

(b) Purchaser shall pay Seller for timber so cut at the rate of \$5.00 per M feet and may apply such stumpage payments to any minimum annual payments becoming due after 1947.

In Witness Whereof, the parties hereto have here-

unto set their hands and seals, in triplicate, on the date first hereinabove written.

**BLUE CREEK REDWOOD
COMPANY, INC.**

By **HAROLD L. WARD,**
President.

.....,
A. K. WILSON.

Exhibit "A"

Timber Deed

In consideration of the sum of Ten Dollars Blue Creek Redwood Co., Inc., a Delaware corporation, hereinafter referred to as Seller, hereby grants to G. L. Speier, hereinafter referred to as Purchaser, all the merchantable fir, cedar, hemlock and spruce of specifications hereinafter set forth as may be cut and removed prior to January 1, 1952, from the following described real property situate in the County of Humboldt, State of California:

S. .E. 1/4 of Section 19, Entire fractional Section 30, Township 12 North, Range 2 East, Humboldt Meridian.

This grant is given upon the following conditions subsequent and restrictions:

(1) That effective January 1st, 1952, all right, title and interest of the Purchaser in said real property and in and to any and all fir, cedar, hemlock and spruce remaining upon said real property, either standing or fallen, shall cease and terminate.

(2) That during the term of this agreement, the Purchaser shall pay to the County of Humboldt all taxes assessed against the fir, cedar, hemlock and spruce, standing or fallen, upon said real property.

3. The Purchaser shall mail currently to the Seller copies of the monthly scale records of the logs removed from said real property under this agreement.

(4) Purchaser shall be permitted to construct all roads over Seller's property lying in Sections 30, 19 and the South 1/2 of Section 18, Township 12 North, Range 2 East, Humboldt, Meridian, necessary for the operations hereunder and Purchaser shall have the right to use such roads during the term of this agreement; such right, however, shall not entitle Purchaser to the exclusive use of such roads.

As to the construction of roads over Seller's property lying in the south 1/2 of said Section 18, and the north 1/2 of Section 19, the Purchaser, within six months from the date of written request by Seller, shall designate the exact location of any right of ways he desires, and thereafter Purchaser

shall have no further rights to right of ways other than those as to designated.

All road building material placed for the purpose of building roads, shall become part of Seller's property and shall be owned by Seller, with the exception of planks. In the event that any persons other than Purchaser are permitted by Seller to use such roads or road built by Purchaser in connection with his operation hereunder, Seller agrees as a condition to granting such use of such road or roads, to require that any persons using such road or roads shall:

(a) Pay annually his share of the maintenance and repair of such road or roads in the proportion that the number of thousand feet of logs hauled by him over such road or roads bears to the total amount of logs hauled by all persons using such road or roads;

(b) Pay for construction of additional turnouts and widening of the road or roads if this becomes necessary due to excessive traffic caused by such person's use of the road or roads.

(c) In the event that Seller permits any other person or persons to build roads over the property which is the subject of this Agreement, then Seller will grant Purchaser the right to use such roads subject to the provisions contained in subdivisions (a) and (b) of this Article of this Agreement.

(5) Purchaser stipulated that he has had access to the property of Seller above described before the

execution of this Agreement and that he is familiar with the boundaries and topography thereof and the timber thereon, and that the quantity and quality of said timber is fully known to him, and that he is not making this Agreement by reason of any representation by Seller. He further stipulates that he shall not make any claim of any kind based on alleged shortage in the amount of timber or the quality or kind thereof which he has the right to cut and remove under this Agreement.

(6) It is understood that the fir, cedar, hemlock and spruce timber covered hereunder is a part of a mixed stand of several species of valuable timber and that, accordingly, Purchaser will conduct his logging operations in a manner so as to do the least possible damage not only to such timber but also to the redwood timber on said lands. In this regard Purchaser agrees:

(a) If tractors are used, all practicable measures will be taken to prevent such tractors from scraping or rubbing against standing timber in such a way as to injure the trees, and the drivers of the tractors shall be so instructed by Purchaser; if lines and rigging are used, similar precautions will be taken to avoid injury to standing timber. Likewise, in falling trees, all practicable precaution will be taken to avoid falling the trees into other standing timber of commercial value. For the purpose of this Article of this Agreement, trees and timber of commercial value shall be all trees of all species of six-

teen inches or more in diameter, at a point three feet from the ground.

(b) It is not intended that Purchaser shall cut any redwood timber on said land, but in the event any redwood timber must be cut in building logging roads or in any other unavoidable cutting in connection with the logging of the fir, cedar, hemlock and spruce timber on said lands, said redwood timber shall be felled in accordance with good logging practices and at Purchaser's expense, but shall remain the property of the Seller. At the option of the Seller, the Purchaser agrees to buck and remove said redwood timber at cost, for the account of Seller, which cost for bucking and removing Seller agrees to pay Purchaser.

If any redwood timber is knocked down by Purchaser in the course of his logging operations, the Purchaser agrees to buck said redwood timber into logs of customary lengths at his own expense. At the option of the Seller, Purchaser agrees to remove said redwood timber at cost, for account of Seller, which cost for removing, Seller agrees to pay Purchaser.

(c) Purchaser agrees at his own cost, but not to exceed ten cents per thousand feet of the timber cut and scaled, to take every reasonable precaution to protect the timber from fire and in particular to comply with the Forestry Laws of the State of California in disposing of slash and brush, and to remove accumulations of slash caused by his opera-

tions from close proximity to the bases of standing timber before burning, and likewise to remove all brush from the neighborhood of steam donkey engines, if used, to a sufficient distance to prevent any sparks of fire from the donkey engines setting fire to any neighboring timber, and to burn, under control, the slash and debris caused by his logging operations along the roads, and to spot-burn heavy accumulations of slash elsewhere as recommended by and under the supervision of the United States Forest Service.

(d) Purchaser agrees to keep all logging camps and other structures used in connection hereunder, and the ground in their vicinity, in a clean, sanitary condition; all rubbish shall be removed and burned or buried, and, when camps or other establishments are moved from one location to another, Purchaser shall burn or otherwise effectively remove and dispose of all debris and abandoned structures.

(7) Purchaser hereby indemnifies and agrees to save Seller harmless from any and all liability arising out of the cutting, falling, damaging or injuring of timber or property owned by a third party and arising from or relating to operations hereunder, and from any and all liability of any kind or character whatsoever to third parties arising out of Purchaser's operations or from fire commenced or authorized to be commenced by Purchaser, his agents or licensees, or required by law or any public authority and connected with or relating to operations hereunder, and indemnifies and agrees to

save Seller harmless from any and all liability of any kind or character whatsoever arising from or relating to the operations hereunder.

(8) Any notice to be given, or payment to be made, under this Agreement, or any communication to be made hereunder between the parties hereto, shall be deemed to be given or made upon the deposit of the same in the United States mails with postage thereon prepaid, duly addressed to the other party as follows:

Harold L. Ward, President,
Blue Creek Redwood Company, Inc.,
Orchard Lake, Michigan.

G. L. Speier,
Arcata, California.

(9) The term "merchantable fir, cedar, hemlock and spruce timber" shall be understood to mean all such trees on said land having a minimum diameter, at a point four and a half ($4\frac{1}{2}$) feet from the ground, of eighteen (18) inches, and all fir, cedar, hemlock and spruce logs which are not less than twelve (12) feet long, at least sixteen (16) inches in diameter inside the bark at the small end, containing at least ninety (90) feet board measure Spaulding log scale, and after deductions for visible indications of defect, seventy per cent (70%) of their gross scale, provided that curve and sweep in logs sixteen (16) feet or more in length and firm blue stain shall not be regarded as defects.

(10) Each and every provision of this Agreement shall inure to and be binding upon the successors and assigns of the Seller and the successors and assigns of the Purchaser.

(11) Parties hereto do mutually cancel, release and discharge all their respective rights and obligations under an agreement between Blue Creek Redwood Company, Inc., and M. A. Puckett, dated February 5th, 1944, and G. L. Speier, as assignee of M. A. Puckett, covering the purchase of the same timber upon said real property.

(12) Purchaser agrees that should he sell, by deed or otherwise, the whole or any part of the standing timber covered by this Deed, that the grantee of Purchaser, his heirs, successors and assigns, shall deposit in escrow with the Central Bank, Trust Department, Oakland, California, contemporaneously with the acquisition of any interest in said real property a quitclaim deed to the Seller herein covering said real property with instructions to said escrow agent in the form attached hereto and marked Exhibit "A."

(13) Should Purchaser breach any of the conditions subsequent and restrictions of this agreement and such breach continue for a period of thirty days after written notice from the Seller, the right of Purchaser to further cut and remove said merchantable timber shall be forfeited and Seller may, at his option, commence an action in law or equity to effectuate the forfeiture.

(14) The Purchaser further agrees that when-

ever all of said timber shall have been cut and removed, the Seller shall enter into full possession of said real property at once, regardless of whether the time for such removal shall have expired or not.

(15) The Purchaser agrees that the right given him under Paragraph (4) shall be solely for the purpose of cutting and removing said timber sold hereunder from the S.E. $\frac{1}{4}$ of said Section 19, and from the entire Fractional Section 30, Township 12 North, Range 2 East, Humboldt Meridian, and said rights given Purchaser under Paragraph (4) shall not be used for the purpose of conveying or transporting timber from any other lands.

In Witness Whereof, the parties hereto have hereunto set their hands and caused their corporate seal to be hereunto affixed this 2nd day of April, 1946.

BLUE CREEK REDWOOD
CO., INC.,

By,
President, Seller.

Exhibit "A"

Central Bank,
Trust Department,
Oakland, California.

Gentlemen :

The undersigned are depositing a quitclaim deed to the Blue Creek Redwood Company, Inc., from

....., dated, covering the S. E. $\frac{1}{4}$ of Section 19 and the entire Fractional Section 30, Township 12 N., Range 2 E., Humboldt Meridian.

You are authorized to deliver this quitclaim deed and any and all subsequent quitclaim deeds of the heirs, successors, or assigns of the grantor to the Blue Creek Redwood Company, Inc., its successors or assigns upon the happening of any one of the following conditions:

(a) By letter from the grantor, his heirs, Successors or assigns, authorizing the Delivery of said quitclaim deed to grantee.

(b) In any event, not later than January 1, 1952.

(c) By order of a court of competent jurisdiction.

Should any controversy arise in connection with the delivery of said quitclaim deed or deeds, you are authorized to hold said documents until authorized to do so by the court of competent jurisdiction.

Very truly yours,

.....

[Endorsed]: Filed May 21, 1954.

In the United States District Court for the
Northern District of California, Southern Division

No. 33618

UNION BOND & TRUST COMPANY, a Corpo-
ration,

Plaintiff,

vs.

BLUE CREEK REDWOOD COMPANY, INC.,
HAROLD L. WARD, FREDERICK S.
STRONG, JR., MARJORIE W. STRONG,
VIRGINIA PALMER WARD, wife of Har-
old Lee Ward, FREDERICK S. STRONG
3RD, JOHN W. STRONG, MARJORIE
STRONG RUSSEL, ROSAMOND ANNE
STRONG PETERS, VIRGINIA PALMER
WARD, daughter of Harold Lee Ward and
Virginia Palmer Ward, ELIZABETH PAL-
MER WARD, ANN WARD, FIRST DOE,
SECOND DOE, THIRD DOE, FIRST ROE
COMPANY, a corporation, SECOND ROE
COMPANY, a corporation, and THIRD ROE
COMPANY, a corporation,

Defendants.

HAROLD L. WARD, FREDERICK S. STRONG,
JR., MARJORIE W. STRONG, VIRGINIA
PALMER WARD, wife of Harold Lee Ward,
FREDERICK S. STRONG 3RD, JOHN W.
STRONG MARJORIE STRONG RUSSEL,
ROSAMOND ANNE STRONG PETERS,
VIRGINIA PALMER WARD, daughter of

Harold Lee Ward and Virginia Palmer Ward,
ELIZABETH PALMER WARD and ANN
WARD, a minor, by and through her guar-
dian, Virginia Palmer Ward, wife of Harold
Lee Ward,

Cross-Complainants,

vs.

UNION BOND & TRUST COMPANY, a cor-
poration, FIRST DOE, SECOND DOE,
THIRD DOE, FOURTH DOE, BLACK
COMPANY, a corporation, and WHITE
COMPANY, an Association,

Cross-Defendants.

ANSWER AND CROSS-COMPLAINT

Comes now, defendants and cross-complainants,
Harold L. Ward, Frederick S. Strong, Jr., Mar-
jorie W. Strong, Virginia Palmer Ward, wife of
Harold Lee Ward, Frederick S. Strong, 3rd; John
W. Strong, Marjorie Strong Russel, Rosamond Anne
Strong Peters, Virginia Palmer Ward, daughter
of Harold Lee Ward and Virginia Palmer Ward,
Elizabeth Palmer Ward and Ann Ward, a minor,
by and through her guardian, Virginia Palmer
Ward, wife of Harold Lee Ward, and answering
plaintiff's Complaint on file herein, admit, deny
and allege as follows:

I.

Answering Paragraph II of the Complaint on
file herein, these defendants, and each of them,
deny, each and every, all and singular, generally

and specifically, the allegations therein contained, and each and every part thereof, and in this connection alleges: That defendant Blue Creek Redwood Company, Inc., was a Delaware corporation at the time of the making of the hereinafter alleged Agreement, but that said corporation was dissolved under the laws of the State of Delaware on the 29th day of May, 1952, and for that reason answering defendants pray that the Complaint be dismissed as to said defendant, Blue Creek Redwood Company, Inc.

II.

Answering Paragraph III of the Complaint on file herein, these defendants, and each of them, deny that Frederick S. Strong, 3rd, is a citizen and resident of the State of Illinois, and in this connection allege that said defendant is a citizen and resident of the State of Michigan.

III.

Answering Paragraph VI of the Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, commencing with the word "At" on line 2, page 3 of said Complaint, to and including the word "land" on line 5, page 3.

IV.

Answering Paragraph VII of the Complaint on file herein, these defendants, and each of them, admit the allegations therein contained, except that these defendants deny that defendants Harold L.

Ward and Frederick S. Strong, Jr., were at all times herein mentioned, or at any time, the attorneys-in-fact for Blue Creek Redwood Company, Inc., or any other defendant other than these answering defendants.

V.

Answering Paragraph VIII of the Complaint on file herein, commencing with the word "at" on line 23 of page 3, to and including the word "effect" on line 28 of page 3, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

VI.

Answering Paragraph IX of the Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, and in this connection allege that plaintiff has no right, title or interest in or to the lands described in said Agreement.

VII.

Answering Paragraph X of the Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, and further deny that plaintiff has been damaged in an amount in excess of \$100,000.00, or in any other amount, or at all.

VIII.

Answering Paragraph XI of the Complaint on

file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, except that defendants admit that the total purchase price to be paid for the said property is the sum of \$750,000.00.

IX.

Answering Paragraph XII of the Complaint on file herein, commencing with the word "Said" on line 16 at page 5, to and including the word "mortgagees" on line 22, page 5, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained; commencing with the word "Said" on line 23, page 5, to and including the word "foundation" on line 25, page 5, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

Wherefore, answering defendants pray judgment.

By Way of Cross-Complaint, Defendants and Cross-Complainants Complain of Plaintiff and Cross-Defendant and for Their First Cause of Action Allege:

I.

That Cross-Defendant, Union Bond & Trust Company, hereinafter called "Union" is a corpora-

tion organized and existing under and by virtue of the laws of the State of Oregon, and is and has been at all times mentioned herein, doing business in the northern district of California, to wit, in Humboldt County, California.

II.

That the true names of Cross-Defendants First Doe, Second Doe, Third Doe, Fourth Doe, Black Company, a corporation, and White Company, an association, are unknown to Cross-Complainants and for that reason they are sued herein under said names as fictitious names; that Cross-Complainants pray that when the true names of said fictitiously-named Cross-Defendants are ascertained they may be inserted herein, and in all subsequent proceedings in this suit, and that this suit may then proceed against them under their true names.

III.

That Cross-Complainants, and each of them, are residents of the State of Michigan and will hereafter be referred to as "Ward."

IV.

That this is a suit of a civil nature between citizens of different states; that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

V.

That the jurisdiction of this Court is founded

on diversity of citizenship, and the amount in controversy as above alleged.

VI.

That Ward is the owner in fee and is in possession of all that certain real property situate in the County of Humboldt, State of California, and in the northern district of said state, which said real property is more particularly described as follows:

Township 11 North, Range 2 East,
Humboldt Meridian

Section 2

SW $\frac{1}{4}$ of SW $\frac{1}{4}$

Fractional Section 3

E $\frac{1}{2}$

NE $\frac{1}{4}$ of NW $\frac{1}{4}$

Section 11

NW $\frac{1}{4}$

Section 17

NW $\frac{1}{4}$

Fractional Section 18

SW $\frac{1}{4}$, N $\frac{1}{2}$

Fractional Section 19

N $\frac{1}{2}$, SE $\frac{1}{4}$

Section 29

NE $\frac{1}{4}$

Fractional Section 30

Entire

Section 32

W¹/₂

VII.

That Ward is the sole owner of and entitled to the exclusive possession of all of said real property, and of all the timber on said lands, both standing and fallen.

VIII.

That Union has no right, title or interest in or to said real property, or said timber, whether standing or fallen; that Union has no right or license to cut down or remove said timber of Ward from the above described lands, or to be upon, cross over, or use said lands for any purpose.

IX.

That on May 12, 1954, and continuously since said date, Union cut, and caused to be cut down, timber of Ward growing on said land, and on said day, and continuously thereafter, removed and caused to be removed therefrom fallen timber owned by Ward; that when Union so cut down and/or removed said timber, it knew that said timber was owned solely by Ward, and that Union had no right or license to cut or remove said timber; that said standing timber was willfully cut and fallen timber willfully removed by Union.

X.

That on May 12, 1954, and continuously since said date, Union has willfully trespassed upon said lands by going upon said lands, hauling logs there-

over, placing and maintaining equipment thereon, and logging logs therefrom, and in so doing, has disregarded "No Trespassing" signs, and has broken gates and locks placed on said lands by Ward, and Union threatens to and will, unless enjoined by the Court, continue such trespasses.

XI.

That said actions and threatened actions of Union will, unless enjoined, cause Ward great and irreparable injury in that such damages will be difficult, if not impossible, to ascertain, and Ward has no plain, speedy or adequate remedy at law.

As and for a Second, Separate and Distinct Cause of Cross-Complaint Against Cross-Defendants, Cross-Complainants Allege as Follows:

I.

The allegations of Paragraphs I through VII, inclusive, of the First Cause of Action, are incorporated herein, and restated with the same effect as though fully set forth.

II.

That on or about the 1st day of May, 1946, A. K. Wilson went into possession of said lands in Humboldt County, State of California, under and by virtue of a certain timber sale agreement between Blue Creek Redwood Company, Inc., a corporation, Cross-Complainants, assignor and said A. K. Wilson, a copy of said timber sale agreement is

attached to the Complaint on file herein, being Exhibit "A" to said Complaint; that attached hereto and marked Exhibit "A" is a modification of said agreement, not contained in the Exhibit attached by plaintiff; that said agreement as modified and set forth as said Exhibit, is by reference incorporated herein with the same effect as though fully set forth. That said agreement is hereinafter referred to as "Agreement."

That shortly thereafter, said A. K. Wilson assigned all of his right, title and interest in and to said Agreement to plaintiff and cross-defendant, Union Bond & Trust Co. (hereinafter called Union); that prior to the 29th day of May, 1952, Blue Creek Redwood Company, Inc., a corporation, assigned in writing to cross-complainants (hereinafter referred to as Ward), the said Agreement and all of the Sellers' right, title and interest therein, and to the benefits therefrom, including, but not limited to, the right to receive stumpage and other payments pursuant to said Agreement, and the right to receive logging and other reports pursuant to the terms of said Agreement; that Blue Creek Redwood Company, Inc., a corporation, and Ward have performed all the terms, covenants and conditions of said Agreement to be performed by them, or any of them thereunder.

That Blue Creek Redwood Company, Inc., prior to its dissolution and on the 29th day of May, 1952, by Grant Deed conveyed the hereinabove described

real property to Ward, and they are now, and have been since that day, the owners in fee thereof.

III

That Union is now, and was on May 12, 1954, in default under the terms of said Agreement for more than sixty (60) days after written notices of such defaults in the following particulars:

(1) Failure to report to Ward all logs removed from the above-described property for the months of June, 1953, to October, 1953, inclusive, in violation of Section 11 of said Agreement.

(2) Failure to supply to Ward all hauling and sealing slips for the months June, 1953, through October, 1953, inclusive, in violation of the provisions of paragraph 11 of said Agreement.

(3) Failure to pay to Ward all sums due for logs removed during the months June, 1953, to October, 1953, inclusive, in violation of paragraph 2 and paragraph 11 of said Agreement.

(4) Failure to pay taxes on the above-described real property in violation of paragraph 4 of said Agreement.

(5) Failure to report and pay for all logs removed in the month of December, 1953, in violation of paragraph 2 and paragraph 11 of said Agreement.

That upon Union's failure to report and pay for any logs removed from the said real property during the months of June, 1953, through October,

1953, inclusive, and the month of December, 1953, by the 20th day of each month following said months, Ward sent to Union a written notice of default, copies of which are attached hereto and made a part hereof, and marked Exhibit "B"; that upon Ward's discovery that Union had failed to pay current taxes on said lands when due, Ward sent Union a written notice of default, a copy of which is attached hereto, incorporated herein, and marked Exhibit "C."

IV.

That on May 12, 1954, Ward, acting under and pursuant to the provisions of paragraph 12 of said Agreement, cancelled said Agreement by sending to Union a letter, registered mail, in the form set forth in said paragraph 12 of said Agreement; that a copy of said letter is attached hereto, marked Exhibit "D" and by reference incorporated herein with the same effect as if fully set forth; that said letter was received by Union on May 13, 1954; that Ward has not waived, and does not by the filing of this action, or otherwise waive, any breaches of said Agreement on the part of Union, and the reference herein to particular breaches by Union is not intended as a waiver of any other breaches.

V.

That since the cancellation of said Agreement by Ward, Union has wilfully continued to cut timber on said lands, and has wilfully continued to remove logs from said lands; that Union denies the right of Ward to cancel said Agreement as

aforesaid, and asserts the right to continue in possession of the said lands; that Union has no right, title or interest in said lands or the timber standing or fallen remaining thereon, and Union's claims have cast a cloud upon Ward's title.

As and for a Third Separate and Distinct Cause of Cross-Complaint Against Cross-Defendant, Union Bond & Trust Co., Cross-Complainants Allege as Follows:

I.

The allegations of Paragraphs I through VII inclusive of the First Cause of Action are incorporated herein and restated with the same effect as if fully set forth.

II.

That on May 1, 1946, Blue Creek Redwood Company, Inc., a corporation, entered into a timber sale agreement with A. K. Wilson, an individual, a copy of said Agreement is attached to the Complaint on file herein, marked Exhibit "A" thereto and modified by Exhibit "A" attached hereto and both Exhibits by reference are incorporated herein with the same effect as if fully set forth.

III.

That prior to the 1st day of January, 1953, said Agreement, and all of A. K. Wilson's right, title and interest therein were assigned to Cross-Defendant, Union Bond & Trust Company, a corporation (hereinafter referred to as Union): that at all times since said date and up to and including

the end of the business day of May 12, 1954, Union was the owner of said Agreement and all of buyers right, title and interest therein and bound by and subject to all of the terms, conditions and obligations thereof.

IV.

That prior to the 29th day of May, 1952, Blue Creek Redwood Company, Inc., a corporation, assigned in writing all of the sellers right, title and interest in and to said Agreement, and the benefits therefrom, including, but not limited to, the right to receive stumpage and other payments due under the terms of said Agreement; that continuously since the date of the aforesaid assignment, Cross-Complainants (hereinafter referred to as Ward) have been, and now are, the owners of said Agreement and all of the right, title and interest of the Seller in and to said Agreement and the benefits therefrom; that said Agreement was cancelled by Ward on May 12, 1954, pursuant to paragraph 12 thereof.

That Ward and Blue Creek Redwood Company, Inc., have performed all the terms, covenants and conditions to be performed on the part of the Seller therein.

V.

That during the period commencing June 1st, 1953, to and including April 30, 1954, logs of the value of \$70,313.74 have been removed from said hereinabove described real property by or on behalf of Union, and for which Union has not paid

Ward, and although demand for same has been made Union still refuses to pay said sum for the logs removed; that in addition to said unpaid sum for logs removed, Union has failed to pay current taxes due on said real property hereinabove described in the sum of \$9,080.96; that Union still refuses to pay said sum due on unpaid current taxes, even though Ward has demanded that Union pay the said sum; that by reason of the premises there is now due, owing and unpaid from Union to Ward the sum of \$79,394.70, together with interest thereon at the rate of seven (7%) per cent from May 12, 1954.

Wherefore, Defendants and Cross-Complainants pray:

(1) That plaintiff take nothing by way of its Complaint.

(2) That this Court issue an injunction pendente lite enjoining the cross-defendants, its officers, agents, servants, employees, attorneys and those persons in active concert or participation with them, or any of them, from trespassing upon the lands covered by said Agreement, and from removing timber therefrom, whether standing or fallen, until final judgment is entered herein.

(3) That upon the trial and hearing of said cause, said preliminary injunction be made final.

(4) That this Court issue its order quieting title to said real property covered by said Agreement in

cross-complainants and declaring that plaintiff and cross-defendant has no right, title or interest therein, and further declaring that plaintiff and cross-defendant has no right, title or interest in the timber, whether standing or fallen, located on said lands.

(5) That cross-complainants be awarded damages against cross-defendant in the sum of \$79,394.70, together with interest thereon at the rate of seven per cent (7%) per annum from May 12, 1954, until paid.

(7) That cross-complainants have such other and further relief as the Court may deem proper in the premises.

(8) That cross-complainants be awarded its costs incurred herein.

CARLETON L. RANK, Esq.,

HERMAN COOK, Esq.,

HARDIN, FLETCHER, COOK
& HAYES,

By /s/ CARLETON L. RANK,

Attorneys for Defendants and
Cross-Complainants.

State of California

County of Alameda—ss.

Carleton L. Rank, being first duly sworn, deposes and says:

That he is one of the attorneys for the Defendants and Cross-Complainants in the above-entitled action;

That he has read the foregoing Answer and Cross-Complaint and knows the contents thereof;

That the same is true of his own knowledge except as to the matters therein stated upon information or belief, and as to those matters that he believes it to be true;

That Affiant makes this verification because Defendants and Cross-Complainants are absent from the County in which he has his office.

/s/ CARLETON L. RANK.

Subscribed and sworn to before me this 27th day of May, 1954.

[Seal] /s/ VIRGINIA GRIFFIN,
Notary Public in and for the County of Alameda,
State of California.

Exhibit "A"

(Copy)

August 19, 1947.

Blue Creek Redwood Company,
Orchard Lake,
Michigan.

Gentlemen:

We wish to submit, for your approval, the following proposal for the orderly payment of the amount now past due on the May 1st, 1946 contract, and the \$25,000.00 note given as part of the down payment thereon:

(1) On or before September 30th, 1947, we will pay the \$1279.76, now past due for taxes, together with interest thereon at the rate of 6% per annum, and the interest due on the above note to September 27th, 1947, at 6% per annum.

(2) On the 15th day of September, 1947, and on the 15th day of each month thereafter, to and including April 15th, 1948, we will pay you the sum of \$2,000.00 to be applied on the principal and interest due on the said note, and, will pay the entire balance due on said note on or before May 15th, 1948.

(3) We will neither cut any trees, nor remove any logs from the land covered by the said Agreement until the note plus interest is paid in full.

(4) If at any time prior to December 1st, 1950, you give us written notice that you have de-

cided not to sell Sections 17 and 18 to the United States Forest Service, and that such land is to be included in said Agreement, the first \$25,000.00 payment on the purchase price for such land shall become due and payable six (6) months from the date of such notice, and the minimum sum of \$25,000.00 will be paid annually thereafter until the entire purchase price has been paid in full.

If the above proposal is satisfactory to you will you kindly indicate your acceptance thereof in the appropriate place below.

Yours very truly,

By /s/ A. K. WILSON,

A. K. WILSON.

Approved:

BLUE CREEK REDWOOD
COMPANY,

By /s/ HAROLD L. WARD,
Pres.

Exhibit "B"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

July 21, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S. W. Fifth Avenue,
Portland 4, Oregon.

Dear Art:

We have not received the logging report nor the logging slips from you on or before July 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed during the month of June, 1953; nor have we received payment, as required under paragraph 2 (d) of said agreement, for the logs removed during the said month of June, which was due under said agreement at Orchard Lake on or before July 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher,
Mr. Arthur B. Dunne.

Exhibit "B"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

August 21, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Avenue,
Portland 4, Oregon.

Dear Art:

We have not received the logging report nor the logging slips from you on or before August 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946,

covering logs removed during the month of July, 1953; nor have we received payment, as required under paragraph 2 (d) of said agreement, for the logs removed during the said month of July, which was due under said agreement at Orchard Lake on or before August 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher,
Mr. Arthur B. Dunne.

Exhibit "B"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

September 22, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Avenue,
Portland 4, Oregon.

Dear Art:

We have not received the logging report from you on or before September 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed during the month of August, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of August, which was due under said agreement at Orchard Lake on or before September 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher,
Mr. Arthur B. Dunne.

Exhibit "B"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

October 21, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Avenue,
Portland 4, Oregon.

Dear Art:

We have not received the logging report from you on or before October 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed

during the month of September, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of September, which was due under said agreement at Orchard Lake on or before October 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher,
Mr. Arthur B. Dunne.

Exhibit "B"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

November 21, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Ave.
Portland 4, Oregon.

Dear Art:

We have not received the logging report from you on or before November 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed during the month of October, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of October, which was due under said agreement at Orchard Lake on or before November 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher,
Mr. Arthur B. Dunne.

Exhibit "B"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

January 21, 1954.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Avenue.
Portland 4, Oregon.

Dear Art,

We have not received the logging report from you on or before January 20, 1954, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed

during the month of December, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of December, which was due under said agreement at Orchard Lake on or before January 20, 1954.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher,
Dunne, Dunne & Phelps.

Exhibit "C"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

December 29, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Avenue,
Portland, 4, Oregon.

Dear Art:

We have been notified by the Tax Collector of Humboldt County that you did not pay the first installment of the 1953 assessment taxes which were due on or before December 10, 1953, upon the timberlands covered by our timberland agreement with you dated May 1, 1946, as required under paragraph 4 of said agreement; nor have we received the tax receipts in respect thereto from you as required under said paragraph 4 of said agreement.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for failure to comply with said paragraph 4.

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher,
Dunne, Dunne & Phelps.

Exhibit "D"

(Copy)

Hardin, Fletcher, Cook & Hayes
925 Central Bank Bldg.
Oakland, Calif.

May 12th, 1954.

A. K. Wilson, and
Union Bond and Trust Company,
1101 S.W. Fifth Avenue,
Portland, Oregon.

Gentlemen:

You are hereby informed that we, the assignees of Blue Creek Redwood Company, Inc., hereby cancel that certain Agreement dated May 1, 1946, wherein A. K. Wilson was the Purchaser of certain lands as are therein described, and said Blue Creek Redwood Company, Inc., was the Seller of said lands.

Frederick S. Strong, Jr.
Marjorie S. Russel

Harold L. Ward
Virginia Ward
Ann Ward
John W. Strong
Marjorie W. Strong
Rosamond S. Peters
Virginia Palmer Ward
Elizabeth Ward
Frederick S. Strong, 3rd

By /s/ HAROLD L. WARD,
Attorney-in-Fact, and

By /s/ FREDERICK S. STRONG, JR.,
Attorney-in-Fact.

/s/ HAROLD L. WARD,

/s/ FREDERICK S. STRONG, JR.

CLR:DM

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF S. L. FLECKNER

State of California
County of Alameda—ss.

S. L. Fleckner, being first duly sworn, deposes and says:

That he is now, and has been continuously since June, 1948, employed by W. W. French at Fortuna,

California, as a timber consultant; that he has his office and residence in Fortuna, California.

That W. W. French has been employed by Harold L. Ward et al., California Barrel Co. and Arrow Mill Co. generally for timber management purposes on the property included in the Agreement attached to the Complaint on file herein, dated May 1, 1946, between A. K. Wilson and Blue Creek Redwood Co. (sometimes herein referred to as Ward property or Ward land), and adjacent property whereon timber is owned by California Barrel Co., Arrow Mill Co., Sage Land & Lumber Co., and Ah Pah Redwood Co.;

That the logging operations on said Ward property are now, and have been for the year immediately last past, being carried on by Union Bond and Trust Co., hereinafter referred to as Union, and, independent logging contractors employed by Coast Redwood Co., Incorporated. That said Coast Redwood Co., Incorporated, is a California corporation; that A. K. Wilson is president of said corporation and of Union; that said Coast Redwood Co., Incorporated, is a Debtor in Possession in proceedings under Chapter XI of the Bankruptcy Act, being Proceedings No. 55837 HW in the United States District Court, Southern District of California, Central Division.

That the Ward property is situate approximately 75 miles north of Eureka and lies generally easterly of U.S. Highway 101. That there is a strip of

land between Highway 101 and the Ward property owned in part by U.S. Forest Service, State of California, and private ownership. That in this general area there are several roads connecting with Highway 101 from the east; that one of these roads is across State of California property and is called the Park Road and extends to the easterly boundary of the state property; that another of said roads is across U.S. Forest Service property and is called the Ah Pah Access Road and extends to the easterly boundary of U.S. Forest Service ownership.

That various owners of land lying easterly of said public roads have constructed logging roads over their respective lands which connect with either of the above roads or with other privately owned roads, which in turn connect with said public roads.

That there are four of such connecting roads on the Ward property and are herein referred to as Access No. 1, Access No. 2, Park No. 1 and Park No. 2.

That affiant's principal duties are the observing of logging practices and determining whether or not such practices conform to the various agreements; to see that the logging is confined to the properties covered by said agreements; to ascertain that logs are properly branded and designated as coming from the area where logged, and matters of a like nature. That also employed by W. W. French to assist in these matters is Ernest Harvey,

who works under the supervision of affiant and spends his time in the woods actually watching and reporting to affiant on the various operations.

On Tuesday, May 18, 1954, affiant in company with C. L. Rank, drove from Eureka, California, to the Ward property; that at about 10:00 a.m. of said morning, your affiant and the said C. L. Rank met one James Trotter, an employee and woods foreman for Union and the following conversation was held between the said Trotter and the said Rank, in substance and effect: Rank told Trotter of the service of the Notice of Cancellation of said May 1, 1946, Agreement and showed Trotter a copy of said Agreement, together with a copy of the said Notice of Cancellation. Rank further told Trotter the Wards did not want anyone to trespass on the property or to use the roads for log hauling purposes and did not want any of the Ward timber cut or removed. Trotter replied in substance and effect, that he understood that, but A. K. Wilson had told him to go ahead and use the Ward roads. Rank replied in substance and effect, that the Ward were going to put up "No Trespass" signs and gates, but would permit Trotter to remove equipment and go through for inspection purposes, but the road was not to be used for logging purposes. The A. K. Wilson referred to by Trotter is A. K. Wilson, President of Union.

That after said conversation, affiant and Rank proceeded to the woods and were met by Mr. Earnest Harvey mentioned hereinabove; that affiant,

in company with said Rank and said Harvey, proceeded to each of said four roads on the Ward properties and, adjacent to said roads and in plain view of anyone using said roads, posted signs which were in white background with black printing, approximately 9" x 11" in size, and there appearing thereon in large letters the words "No Trespassing"; that each of said signs was signed as follows: "H. L. Ward, et al., Owners."

That after the posting of the last of said signs your affiant, together with Rank, met Mr. E. Lane, an independent logging contractor logging on property immediately adjacent and to the east of the Ward property, and who has been, and is now, using the roads over the Ward property for logging purposes. Mr. Lane stated to C. L. Rank, in the presence of affiant, that A. K. (referring to the said A. K. Wilson) had sent a message to him at 2:30 a.m. of that morning telling him that everything was settled and to go ahead logging. That Rank replied in substance and effect, that there was nothing to settle and that neither the said A. K. or his attorneys had even talked with him.

Thereafter, and on said day, affiant proceeded to construct a gate at the entrance to the road Park No. 1, which said gate consisted of a steel cable stretching across the road and firmly fastened at one end to a stump or tree and fastened by a locked padlock at the other end; that a similar sign to that mentioned above was hung on said gate

at about the center of said road. That shortly thereafter a similar gate was prepared for road Park No. 2.

That affiant, together with Rank and Harvey, proceeded then to the Ah Pah Access Road and there met Trotter; that it was then about 6:00 p.m. of said day; that Trotter stated to affiant, Rank and Harvey, that he had again talked with A. K. Wilson on the telephone and told Wilson that the signs and gates were either in place or going to be in place and that said Wilson had instructed him to tear down the gates and go through. Rank asked Trotter if the gates were to be torn down that night or in the morning and Trotter stated they would probably wait until the morning.

That Rank, shortly thereafter, left to return to Eureka and affiant, together with Harvey, proceeded to place like gates on the Ward property at Access No. 1 and Access No. 2. That upon arriving at Access No. 1 affiant found that the signs that had been placed there that morning had been torn down; that affiant replaced the signs, constructed a gate with a sign on it and padlocked said gate. That affiant and Harvey then proceeded to access No. 2 and constructed a like gate with a sign on it and padlocked said gate. Affiant then proceeded to Park No. 2 and closed and locked that gate and placed a sign thereon. That all of said signs and gates were on Ward property.

On the following day, Tuesday, May 19, 1954, affiant proceeded to the Ward property and directly

to Access No. 1 where he found the gate pulled down and evidence of tire marks showing a vehicle had driven over the gate; that affiant then replaced the gate.

That while affiant was at said gate and at about 6:45 a.m. of said morning, two panel trucks loaded with approximately twelve employees of Union arrived and talked with affiant; that said employees then left one of them, stating that they were going to see Trotter. About 7:30 a.m. of said morning Mr. Trotter came to the gate and asked affiant how many gates there were and where located; that affiant told him there were four gates and where each was located. That Trotter then stated he was going to return to the camp and call A. K. Wilson. During the period of time that affiant was at Access No. 1 he could see the Access No. 2 road and observed approximately ten logging trucks loaded going through Access Gate No. 2 and across Access Road No. 2. At about 9:15 that morning affiant went to inspect the gate at Access No. 2, found that the lock had been broken and the gate open. The "No Trespassing" signs had not been removed.

That about 11:00 a.m. of said morning, affiant had a further conversation with said Trotter in which the said Trotter stated in substance and effect, that he had talked with A. K. on the telephone since talking to affiant that morning and that A. K. had told him to go through the gates and he would have a photographer there. Affiant asked Trotter what time he planned this move and Trotter replied in

substance and effect, "Sometime early this afternoon." After said conversation affiant went back to Access No. 2 and repaired and closed the gate and put on a new padlock. That at about 12:15 of said day, affiant returned to Access No. 1 gate and parked his car behind the gate, locked the gate and sat in his car; that about 1:30 p.m. of said day, one Robert Doxey, woods superintendent for Union, accompanied by Trotter and some twenty to twenty-five employees of Union, arrived at said gate, together with a cameraman; that the said Doxey and one or two others got out of their car, proceeded to the gate and broke it down and Doxey then said to the men in substance and effect, "Let's go through and get to work." Thereupon, about fifteen of the aboved-named men drove through the gate around affiant's car and proceeded to drive down the road across the Ward property. Affiant then had a conversation with Trotter in which Trotter stated in substance and effect that "Orders from Wilson are to go right ahead."

That during the evening of said day affiant received instructions from Rank that he was to meet a deputy sheriff at Orick, California, at 5:30 of the following day and that said deputy sheriff would accompany him to the Ward property.

That at approximately 5:30 a.m. the morning of May 20, 1954, affiant met one Tucker, a deputy sheriff of the County of Humboldt, City of Orick, State of California, and accompanied by said deputy

sheriff, went to the woods and waited at the buildings known as the machine shop, which are located on the Ah Pah Access Road and off the Ward property.

That at about 6:30 a.m. of said morning affiant, said deputy sheriff, said Doxey, Trotter, Lane and Harvey went into the shop buildings together, where Doxey displayed to everyone present a seven-page telegram from A. K. Wilson, as president of Union, to Rank, which Doxey stated he had received at midnight the night before. Affiant told Doxey in substance and effect, that nothing had changed, that anyone going on the Ward lands would be trespassing. Whereupon, all of the above-named persons went outside where a group of from 75 to 100 men were gathered, mostly employees of Union. That the said deputy sheriff addressed the said employees, including Trotter and Doxey, and stated in substance and effect, that as far as he was concerned the "No Trespassing" signs were up, the gates had been closed, and that anyone going through would be trespassing. He further stated that he had no authority to make arrests unless warrants were issued or he were instructed to do so by the sheriff, but that if he were instructed, he would arrest anyone going through the gates. Whereupon, one of Union's supervisional employees, the chopping boss, whose name is unknown to affiant, stood up and addressed the men and told them that A. K. Wilson had called and stated in effect that he would pay the fine of any man arrested for going through the gates and pay them

double wages while being held. That affiant shortly thereafter left the woods and returned to Eureka.

/s/ S. L. FLECKNER.

Subscribed and sworn to before me this 28th day of May, 1954.

[Seal] /s/ DOROTHEA MARR,
Notary Public in and for the County of Alameda,
State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 3, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF ERNEST HARVEY

State of California,
County of Humboldt—ss.

Ernest Harvey, being first duly sworn, deposes and says:

That he is now and has been since September 4, 1952, an employee of W. W. French; that his job and occupation for the past year has been policing log distribution of logs produced in Township 12 (Ward lands and the property adjacent thereto), inspecting log brands and watching logging lines to see that logging was confined to the proper area.

That on Friday morning, May 14, 1954, he was instructed by W. W. French that the Wards (Cross-

Complainants herein) had terminated their contract with Union Bond & Trust Co., hereinafter termed Union, and for affiant to advise various loggers hauling logs over the roads on the Ward lands and truckers using the said roads that he understood the said roads might be closed within the next few days. During the course of said day affiant did tell various truckers in substance and effect, that he understood that the roads over the Ward lands may be closed in a few days.

On May 17, 1954, affiant was instructed by C. L. Rank, attorney for the Wards, to advise all persons whom he saw, or knew were using the roads over the Ward lands, that the Wards had cancelled the contract with Union and planned on closing the roads in a day or so. In the course of said day, and in the vicinity of the Ward lands, he met James Trotter, woods foreman for Union and Robert Doxey, woods superintendent for Union, and told to them in substance and effect, as above instructed. Whereupon James Trotter replied in substance and effect that "If the roads were closed we will have to stop using them until opened." That, later in said day, your affiant again had a conversation with said Trotter in the same general vicinity and said Trotter stated in substance and effect that he had just talked to A. K. Wilson (President of Union) on the telephone and that he was told by the said A. K. Wilson, "Go right on logging. There is nothing to the rumor and nothing is going to happen"; that the said Doxey, at about the same time and place, also

told affiant that he had talked to the said A. K. Wilson that morning and had been instructed by him to go right on logging and "That is what we are going to do."

That on the morning of Tuesday, May 18, 1954, affiant went to the Ward lands, arriving about 8:30 that morning, and saw Union performing logging operations on the Ward lands; that logging trucks were hauling logs over the Ward lands and employees of Union and independent loggers had been transported to their place of employment over the four roads on the Ward lands; that during said morning and in the vicinity of the Ward lands, affiant had a conversation with one E. Lane, an independent logger, who is presently logging on lands immediately adjacent and to the east of Ward lands and whose logs are hauled over the roads on Ward lands; that the said Lane stated to affiant in substance and effect that he had received word from the said A. K. Wilson at 2:30 a.m. of that day to go right on logging, that everything had been settled. That said Lane further stated that he hadn't planned on logging that day and had paid his men off the day before, but that after A. K. Wilson sent the message he rounded up his men and went ahead logging. While affiant was having the above conversation with Lane, Union's chopping boss, whose name affiant does not know, came up and stated to affiant, "Our instructions are to keep the trucks rolling."

That during the rest of said day affiant, in company with S. L. Fleckner, and part of the time accompanied by C. L. Rank, proceeded to the four roads leading across the Ward property and placed No Trespassing signs and padlocked gates, as set forth in detail in the Affidavit of S. L. Fleckner on file herein.

On the following morning, to wit, Wednesday, May 19, 1954, affiant arrived at the Ward property at about 6:55 a.m. of said day. Affiant found that at that time the gates at Park No. 1 and Park No. 2 were intact and the signs were up; that at about 7:15 a.m. of said day, a Union crew arrived at Park No. 2 and the following conversation in substance and effect ensued. One of the men stated "What's doing?" Affiant replied that the roads were closed. The man replied, "Well, that's that, we are not going through the gate." That while affiant was at Park gate No. 2 he could see the Park No. 1 road and the locality of Park No. 1 gate; that at 7:20 a.m. he saw that Park No. 1 gate had been removed and saw a pick-up truck and cars going through the gate. That about 7:30 a.m. the hereinabove mentioned chopping boss for Union drove to Park gate No. 2 where affiant was standing and stated to affiant, "I am going to pull the gate down"; that said chopping boss thereupon hooked a chain from his truck to the gate preparatory to pulling the gate down; that affiant got his camera out of his car and was ready to take a photograph of the gate being pulled down; that the chopping boss,

upon seeing the camera, unhooked the chain from the gate and left. Shortly thereafter affiant proceeded to Park gate No. 1 and replaced the gate.

That thereafter affiant, in company with S. L. Fleckner, went to the shop at the entrance to the woods where he overheard a conversation between S. L. Fleckner and said Trotter, wherein Trotter stated in substance and effect as follows: "I have talked with Wilson and he has told us to go through the gates. We are going through early this afternoon." That about 1:30 p.m. that afternoon, affiant was at access gate No. 2 and from there saw the said Robert Doxey pull down access gate No. 1; that affiant then proceeded down to access No. 1 and was asked by the said Doxey if the other three gates were up, to which affiant replied "Yes," and Doxey replied that he was going to take pictures of the gates. That at about 2:30 p.m. of said day affiant observed a load of Ward logs being hauled by a trucker and followed the truck to the sawmill, formerly operated by A. K. Wilson under the firm name and style of Coast Redwood Co. and now being operated by the said A. K. Wilson under the firm name and style of Washington Lumber Co. That said sawmill is located near Arcata, California.

On the next day, Thursday, May 20, 1954, affiant met S. L. Fleckner and a deputy sheriff of the County of Humboldt, California, at about 5:30 a.m. of said day. That thereafter affiant and the deputy sheriff and S. L. Fleckner went to the machine shop near the entrance to the woods, arriving at about

6:30 a.m. Shortly thereafter said Doxey displayed to affiant and others, a copy of a 7-page telegram that Union had sent to C. L. Rank; that shortly thereafter in front of said shop the deputy sheriff spoke to the Union employees, and others who were present, and told them in substance and effect that as far as he was concerned the No Trespassing signs were up, the gates were closed, and anyone going through was trespassing. He further stated he had no plans to make any arrests unless warrants were issued or unless he was so instructed by the sheriff, but that if he were so instructed that he would arrest anyone going through the gates. Thereupon, the said chopping boss stood up and stated to the men that A. K. had telephoned and said that he would pay the fine of any man arrested for going through the gates and pay them double wages while being held. Shortly thereafter affiant returned to Orick, California, with the deputy sheriff.

That that afternoon affiant returned to the woods and the Ward properties and found that each of the four gates had been torn down and all of the signs destroyed, with the exception of two signs on the access No. 2 road; that affiant remained in the area that afternoon and saw trucks loaded with logs hauling logs across all of the four roads which had been locked, except that affiant saw no trucks on access Road No. 1. That that afternoon affiant saw logging being performed on the Ward property and Ward logs being logged to the landing preparatory to being loaded on trucks.

That Union employs two scalers by name of Henry Nelson and John Doe Elliot; that said scalers scale all logs coming out of Ward lands and the lands adjacent thereto to the east; that on Monday, May 24, 1954, affiant asked each of said scalers for a record showing the quantity of logs removed from the Ward and other lands during the preceding week; that neither of said scalers would give affiant such information and each stated in substance and effect that he had been instructed not to give any information to affiant; that without such information it is impossible for affiant or the Wards to determine the quantity of logs being removed from the Ward or adjacent lands.

/s/ ERNEST HARVEY.

Subscribed and sworn to before me this 28th day of May, 1954.

[Seal] /s/ DEWEY DOLF,
Notary Public in and for the County of Humboldt,
State of California.

[Endorsed]: Filed June 3, 1954.

Affidavit of Service by Mail attached.

[Title of District Court and Cause.]

INTERROGATORY NUMBERS 1 THROUGH 66
OF DEFENDANTS AND CROSS-COM-
PLAINANTS ADDRESSED TO PLAIN-
TIF AND CROSS-DEFENDANTS

Pursuant to Rule 33 of the F.C.P. defendants and Cross-Complainants address the following interrogatories to the plaintiff and Cross-defendant, Union Bond & Trust Co.

For the purpose of shortening the interrogatories we have designated certain named parties or property as follows:

(a) Union Bond & Trust Co., plaintiff and cross-defendant, is designated "Union."

(b) Harold L. Ward, et al, defendants and cross-complainants, are designated as "Ward."

(c) The Agreement between Blue Creek Redwood Co., a Delaware corporation, and A. K. Wilson, an individual, dated May 1, 1946, a copy of which is attached to the complaint and marked Exhibit "A" thereto, is referred to as "Agreement."

(d) The real properties described in said agreement are referred to as "Ward lands."

(e) Coast Redwood Co., Incorporated, a California corporation, is referred to as "Coast."

1. When did Union commence logging operations in Humboldt or Del Norte Counties, California?

2. When did Union commence logging operations on the Ward lands?

3. Did Union remove logs from the Ward lands during the months June through October, inclusive, 1953?

4. Were logs removed from the Ward lands during each of those month for or on behalf of Coast?

5. What was the total quantity of logs removed from the Ward lands during the month of June, 1953?

6. What was the quantity of logs removed from the Ward lands by or on behalf of Coast during the month of June, 1953?

7. What was the quantity of logs removed from the Ward lands by or on behalf of Union during the month of June, 1953?

8. Were scale slips, logging reports or payment sent to Ward on or before July 20th, 1953, for logs removed from Ward lands during the month of June, 1953?

9. Did Union receive a default notice, a copy of which is attached hereto, marked Exhibit "A," on or about the 23rd day of July, 1953?

10. Did Union send scale slips and logging report to Ward showing total quantity of logs removed from the Ward lands during the month of June, 1953, and, if so, what was the approximate date?

11. What was the total quantity of logs reported by Union to Ward as having been removed from the Ward lands during the month of June, 1953?

12. Did Union make any payment to Ward for logs removed from the Ward lands during the month of June, 1953, and, if so, what was the date and amount of such payment?

13. What quantity of logs were paid for by such payment?

14. What was the total quantity of logs removed from the Ward lands during the month of July, 1953?

15. What was the quantity of logs removed from the Ward lands by or on behalf of Coast during the month of July, 1953?

16. What was the quantity of logs removed from the Ward lands by or on behalf of Union during the month of July, 1953?

17. Were scale slips, logging reports or payment sent to Ward on or before August 20, 1953, for logs removed from Ward lands during the month of July, 1953?

18. Did Union receive a default notice, a copy of which is attached hereto, marked Exhibit "B," on or about the 24th day of August, 1953?

19. Did Union send scale slips and logging report to Ward showing total quantity of logs removed from the Ward lands during the month of July,

1953, and, if so, what what was the approximate date?

20. What was the total quantity of logs reported by Union to Ward as having been removed from the Ward lands during the month of July, 1953?

21. Did Union make any payment to Ward for logs removed from the Ward lands during the month of July, 1953, and, if so, what was the date and amount of such payment?

22. What quantity of logs were paid for by such payment?

23. What was the total quantity of logs removed from the Ward lands during the month of August, 1953?

24. What was the quantity of logs removed from the Ward lands by or on behalf of Coast during the month of August, 1953?

25. What was the quantity of logs removed from the Ward lands by or on behalf of Union during the month of August, 1953?

26. Were scale slips, logging reports or payment sent to Ward on or before September 20th, 1953, for logs removed from the Ward lands during the month of August, 1953?

27. Did Union receive a default notice, a copy of which is attached hereto, marked Exhibit "C," on or about the 24th day of September, 1953?

28. Did Union send scale slips and logging report

to Ward showing total quantity of logs removed from the Ward lands during the month of August, 1953, and, if so what was the approximate date?

29. What was the total quantity of logs reported by Union to Ward as having been removed from the Ward lands during the month of August, 1953?

30. Did Union make any payment to Ward for logs removed from the Ward lands during the month of August, 1953, and, if so, what was the date and amount of such payment?

31. What quantity of logs were paid for by such payment?

32. What was the total quantity of logs removed from the Ward lands during the month of September, 1953?

33. What was the quantity of logs removed from the Ward lands by or on behalf of Coast during the month of September, 1953?

34. What was the quantity of logs removed from the Ward lands by or on behalf of Union during the month of September, 1953?

35. Were scale slips, logging reports or payment sent to Ward on or before October 20th, 1953, for logs removed from Ward lands during the month of September, 1953?

36. Did Union receive a default notice, a copy of which is attached hereto, marked Exhibit "D," on or about the 23rd day of October, 1953?

37. Did Union send scale slips and logging report to Ward showing total quantity of logs removed from the Ward lands during the month of September, 1953, and, if so, what was the approximate date?

38. What was the total quantity of logs reported by Union to Ward as having been removed from the Ward lands during the month of September, 1953?

39. Did Union make any payment to Ward for logs removed from the Ward lands during the month of September, 1953, and, if so, what was the date and amount of such payment?

40. What quantity of logs were paid for by such payment?

41. What was the total quantity of logs removed from the Ward lands during the month of October, 1953?

42. What was the quantity of logs removed from the Ward lands, by or on behalf of Coast during the month of October, 1953?

43. What was the quantity of logs removed from the Ward lands by or on behalf of Union during the month of October, 1953?

44. Were scale slips, logging reports or payment sent to Ward on or before November 20th, 1953, for logs removed from Ward lands during the month of October, 1953?

45. Did Union receive a default notice, a copy of which is attached hereto, marked Exhibit "E," on or about the 23rd day of November, 1953?

46. Did Union send scale slips and logging report to Ward showing total quantity of logs removed from the Ward lands during the month of October, 1953, and, if so, what was the approximate date?

47. What was the total quantity of logs reported by Union to Ward as having been removed from the Ward lands during the month of October, 1953?

48. Did Union make any payment to Ward for logs removed from the Ward lands during the month of October, 1953, and, if so, what was the date and amount of such payment?

49. What quantity of logs were paid for by such payment?

50. Were logs removed from the Ward lands during the month of December, 1953, by Union and Coast?

51. Did Union, on or before January 20, 1954, send scale slips, reports or payment for any logs removed from the Ward lands during the month of December, 1953?

52. Did Union receive a default notice, a copy of which is attached hereto and marked Exhibit "F," on or about January 23rd, 1954?

53. What was the total quantity of logs removed from the Ward lands during the month of December, 1953?

54. What was the total quantity of logs reported to Ward by Union as having been removed from the Ward lands during the month of December, 1953?

55. Did Union pay Ward, prior to May 12, 1954, for any logs removed from the Ward lands during the month of December, 1953, and, if so, what was the date and amount of such payment?

56. Did Union pay the current real property taxes on the Ward lands which became due November 10, 1953, and delinquent December 10, 1953, on or before December 10, 1953?

57. Did Union receive a notice of default, a copy of which is attached hereto and marked Exhibit "G," on or about December 31, 1953?

58. Did Union, on or before May 12, 1954, make any payment on current real property taxes on the Ward lands, that is, taxes for 1953-1954, the first installment of which became due on November 10, 1953?

59. What was the total amount due on May 12, 1954, for real property taxes on the Ward lands for the years 1953-1954?

60. What was the total quantity of logs removed from Ward lands during each of the following months, January, February, March and April, 1954?

61. What was the total quantity of logs removed from the Ward lands from May 1st to and including May 13th, 1954?

62. What was the total quantity of logs removed from the Ward lands from May 14, 1954, to June 30, 1954?

63. Were the logs which were removed from the Ward properties after May 13, 1954, sold to third parties?

64. If the answer to the last question is "yes," what was the gross amount in dollars received for such logs without deducting any costs of logging or hauling such logs?

65. Have any logs been removed from the Ward lands since June 30, 1954?

66. If the answer to the last question is "Yes," give the total quantity removed and the gross amount in dollars received upon the sale of such logs.

/s/ CARLTON L. RANK,

/s/ HERMAN COOK,

HARDIN, FLETCHER, COOK
& HAYES,

By /s/ LAURENCE S. FLETCHER,
Attorneys for Defendants and
Cross-Complainants.

Exhibit "A"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Avenue,
Portland 4, Oregon.

Dear Art:

We have not received the logging report nor the logging slips from you on or before July 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed during the month of June, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of June, which was due under said agreement at Orchard Lake on or before July 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not

notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher
Mr. Arthur B. Dunne

Exhibit "B"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

August 21, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Ave.,
Portland 4, Oregon.

Dear Art:

We have not received the logging report nor the logging slips from you on or before August 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed during the month of July, 1953; nor have we received payment, as required under

paragraph 2(d) of said agreement, for the logs removed during the said month of July, which was due under said agreement at Orchard Lake on or before August 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and

2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher
Mr. Arthur B. Dunne

Exhibit "C"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

September 22, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Ave.,
Portland 4, Oregon.

Dear Art:

We have not received the logging report from you on or before September 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed during the month of August, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of August, which was due under said agreement at Orchard Lake on or before September 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11;
and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher
Mr. Arthur B. Dunne

Exhibit "D"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

October 21, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Ave.,
Portland 4, Oregon.

Dear Art:

We have not received the logging report from you on or before October 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed dur-

ing the month of September, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of September, which was due under said agreement at Orchard Lake on or before October 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher,
Mr. Arthur B. Dunne

Exhibit "E"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

November 21, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Avenue,
Portland 4, Oregon.

Dear Art:

We have not received the logging report from you on or before November 20, 1953, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed during the month of October, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of October, which was due under said agreement at Orchard Lake on or before November 20, 1953.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher
Mr. Arthur B. Dunne

Exhibit "F"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

January 21, 1954.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Ave.,
Portland, Oregon.

Dear Art:

We have not received the logging report from you on or before January 20, 1954, as required under paragraph 11 of our timberland agreement with you dated May 1, 1946, covering logs removed

during the month of December, 1953; nor have we received payment, as required under paragraph 2(d) of said agreement, for the logs removed during the said month of December, which was due under said agreement at Orchard Lake on or before January 20, 1954.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for:

1. Failure to comply with said paragraph 11; and
2. Failure to comply with said paragraph 2(d).

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given; nor shall anything herein be construed as waiving our position concerning the assignability of Purchaser's rights under said agreement.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher
Dunne, Dunne & Phelps

Exhibit "G"

(Copy)

Harold Lee Ward
Orchard Lake, Michigan

December 29, 1953.

Mr. A. K. Wilson, President,
Union Bond & Trust Company,
1101 S.W. Fifth Ave.,
Portland, Oregon.

Dear Art:

We have been notified by the Tax Collector of Humboldt County that you did not pay the first instalment of the 1953 assessment taxes which were due on or before December 10, 1953, upon the timberlands covered by our timberland agreement with you dated May 1, 1946, as required under paragraph 4 of said agreement; nor have you as required under said paragraph 4 of said agreement.

Please consider this letter as a notice of default from us in the performance of said agreement as to the above particulars for failure to comply with said paragraph 4.

Please also note the provisions contained in paragraphs 12 and 19 of said agreement.

Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given.

Very truly yours,

/s/ HAROLD L. WARD,
Attorney-in-Fact.

HLW-GFB

cc—Mr. Lawrence S. Fletcher
Dunne, Dunne & Phelps

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 10, 1954.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Comes Now, Union Bond & Trust Company, a corporation, plaintiff and cross-defendant above named, and answering the alleged cross-complaint of defendants and cross-complainants on file herein, and each alleged cause of action thereof, shows as follows:

I.

Admits and avers as follows:

1. Plaintiff and cross-defendant refers to its complaint on file herein, and incorporates the same, and each allegation and averment thereof, herein by reference as fully as though set forth at length.

2. At all times mentioned herein, plaintiff and cross-defendant has been, and now is, doing business in the State of California.

3. Said agreement, Exhibit A to the complaint herein, was modified as set forth in Exhibit A to the alleged cross-complaint herein. Shortly after May 1, 1946, and long prior to January 1, 1953, said A. K. Wilson assigned said agreement to plaintiff and cross-defendant and ever since said assignment plaintiff and cross-defendant has been, and now is, the owner of said agreement and of all the right, title and interest of buyer thereunder. Ever since May 1, 1946, said A. K. Wilson and plaintiff and cross-defendant have been, and plaintiff and cross-defendant now is, in the exclusive possession of all of said lands described in said agreement, Exhibit A to said complaint. For a long period prior to May 12, 1954, and continuously to the date hereof, plaintiff and cross-defendant has been, and now is, hauling logs and other forest products over said lands, and has placed and maintained, and is now placing and maintaining, machinery and equipment thereon. After May 12, 1954, plaintiff and cross-defendant did remove certain fallen timber from parts of said lands described in said agreement, Exhibit A to said complaint.

4. From time to time plaintiff and cross-defendant has received from defendant and cross-complainant Harold L. Ward certain letters, each of which said letters purported to be a "Notice of Default," as set forth in Exhibits B and C to said alleged cross-complaint. On or about May 13, 1954, plaintiff and cross-defendant received a letter from defendants and cross-complainants Harold L. Ward

and Frederick S. Strong, Jr., Exhibit D to said alleged cross-complaint, purporting to be a cancellation of said agreement, Exhibit A to said complaint.

5. In performance under said agreement, Exhibit A to said complaint, plaintiff and cross-defendant tendered to each of the defendants herein the following amounts on or about the following dates:

May 19, 1954—\$1,281.87;

June 3, 1954—\$18,989.05;

June 17, 1954—\$9,102.82.

Each of said tenders was refused by said defendants, without specifying any reason or basis for such refusal.

II.

Plaintiff and cross-defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations of the alleged cross-complaint, or of any alleged cause of action thereof, in respect of fictitiously named defendants, or the purported assignment of said agreement or conveyance of said lands by defendant Blue Creek Redwood Company, Inc., to the individually named defendants and cross-complainants, or the purported dissolution of defendant Blue Creek Redwood Company, Inc.

III.

Plaintiff and cross-defendant denies each and every remaining allegation and averment of said

alleged cross-complaint and of each alleged cause of action thereof not hereinabove admitted or denied.

And for a Second, Separate and Independent Answer and Defense to Said Alleged Cross-Complaint and to Each Alleged Cause of Action Thereof, Plaintiff and Cross-Defendant Shows as Follows:

I.

Plaintiff and cross-defendant refers to all the matters and things set forth in paragraph I of its first answer and defense above, and incorporates the same herein by reference as fully as though set forth at length.

II.

Defendants and cross-complainants were, and are, in breach and default under said agreement, Exhibit A to said complaint, as hereinabove more specifically set forth, and each of said breaches and defaults of said defendants and cross-complainants was, and is, a material breach and default under said agreement.

And for a Third, Separate and Independent Answer and Defense to Said Alleged Cross-Complaint and to Each Alleged Cause of Action Thereof, Plaintiff and Cross-Defendant Shows as Follows:

I.

Plaintiff and cross-defendant refers to all the matters and things set forth in paragraph I of its first answer and defense above, and incorporates

the same herein by reference as fully as though set forth at length.

II.

If said agreement has been assigned and said lands conveyed by defendant Blue Creek Redwood Company, Inc., to said individually named defendants and cross-complainants, and if said defendant Blue Creek Redwood Company, Inc., has been dissolved, all in the manner and as set forth in said cross-complaint, said assignment, conveyance and dissolution was, and is, a breach and default, and a material breach and default, under said agreement.

Wherefore, plaintiff and cross-defendant Union Bond & Trust Company prays that defendants and cross-complainants take nothing by their cross-complaint on file herein, and that plaintiff and cross-defendant have judgment herein as prayed in its complaint.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Plaintiff and Cross-Defendant Union
Bond & Trust Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 16, 1954.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES

Comes Now Union Bond & Trust Company, a corporation, plaintiff and cross-defendant above

named, and answering the interrogatories heretofore served on it and filed herein, shows as follows:

For convenience plaintiff adopts the same references adopted by defendants and cross-complainants in their interrogatories.

1. Union has in the past, at various times, conducted logging operations in Humboldt and Del Norte Counties, California. The last of those operations conducted by Union in either of those counties were commenced during the month of April, 1953.

2. During the month of June, 1953.

3. Yes. See Nos. 10, 12 and 13 below.

4. Yes. See Nos. 10, 12 and 13 below.

5. Approximately 2,883,610 feet.

6. Approximately 2,508,841 feet.

7. Approximately 374,769 feet.

8. Yes. See Nos. 10, 12 and 13 below.

9. Union received a letter, of which Exhibit "A" to said interrogatories is a copy, on or about July 23, 1953. Said letter speaks for itself.

10. Weekly logging reports were delivered to Ward as logs were removed on Friday of each week showing the total quantity of logs removed from the Ward lands during that week. Said weekly reports were also cumulative for each calendar month showing the total quantity of logs removed from the Ward lands during each calendar month. Said

logging reports were delivered to Ward during all of the times referred to in said interrogatories up to the time of said purported termination of said agreement by Ward, and said reports showed the total quantity of logs removed from the Ward lands during that period.

In addition to the above reports it was the practice to make a monthly report from the scale slips and send this monthly report and the scale slips to Ward. During the period June to December, inclusive, 1953, these monthly reports and scale slips were sent to Ward on or about the 20th day of each month for logs removed during the preceding calendar month, the exact dates being unknown to Union but in some instances it was before the 20th day of the month and in some instances it was after the 20th day of the month. Through inadvertence during the period June to October, inclusive, 1953, the scale slips covering logs removed from the Ward lands by Union were misplaced and through error and inadvertence said scale slips were not included in said monthly reports (although the logs covered thereby were included in said weekly reports) for said period and were not sent to Ward with the other scale slips. After receipt of the claim by Ward, following the purported termination of said agreement, that further payments were due for logs removed during the months of June to October, inclusive, 1953, said scale slips were found and retained by Union for the purpose of making an audit of its books and records and on completion of that audit said scale slips were sent to Ward.

11. Approximately 2,883,610 feet.

12. Union paid to Ward, for logs removed during each of the months June to October, inclusive, 1953, the following amounts on the following dates: \$12,544.21, September 18, 1953; \$7,358.25, October 21, 1953; \$7,435.43, November 24, 1953; \$5,544.12, December 16, 1953; \$6,509.29, January 21, 1954. Said payments were tendered to Ward as performance in full under said agreement for all logs removed from the Ward lands during each of the months of June to October, inclusive, 1953, and were tendered in full satisfaction of the claimed defaults under said agreement referred to in Exhibits "A" to "E" to said interrogatories. Said payments were accepted by Ward unconditionally and without qualification, and at said times Ward was as fully advised as Union as to the total quantity of logs removed from the Ward lands. At no time prior to the purported termination of said agreement by Ward, did Ward make any claim or demand on Union for any further or additional payment or performance under said agreement for logs removed during any of the months of June to October, inclusive, 1953.

13. Said payments were tendered to Ward and accepted by Ward, separately as to each month, as payments in full for all logs removed from the Ward lands during the said months of June to October, inclusive, 1953. At the times of such payments, and each of them, Union believed that such payments were, and each was, in full for all logs

removed during each of the months of June to October, inclusive, 1953, in accordance with the terms of said agreement. After receipt of the claim by Ward, following the purported termination of said agreement, that additional amounts were due for logs removed during the months of June to October, inclusive, 1953, Union caused an audit to be made of its books and records and only then was Union advised, as stated in No. 10 above, that said payments did not include logs removed from said lands, in the following quantities:

June—374,769 feet;

July—1,359,007 feet;

August—1,124,215 feet;

September—1,831,476 feet;

October—2,253,560 feet.

It was the intention of Union at the time of each of said payments to pay for all logs removed, and payments were not made for the quantity of logs referred to above only as the result of error and inadvertence. Since the time of said purported termination of said agreement, Union has tendered certain payments to Ward under said Agreement, all of which have been refused, and Ward has advised Union that it will not accept any such tender. Although Union claims that in past years it has overpaid amounts due under said agreement and such overpayments should be applied to any stumpage payments now found to be due, and although Union claims certain other offsets to amounts due

under said agreement, Union is nevertheless, at this time, ready, willing and able to pay the amount of the deficiency for logs removed during the months of June to October, inclusive, 1953, if Ward will accept such payment in performance of said agreement, and without attempting to forfeit the rights of Union under said Agreement.

14. Approximately 2,830,656 feet.

15. Approximately 1,471,649 feet.

16. Approximately 1,359,007 feet.

17. Yes. See Nos. 10, 12 and 13 above.

18. Union received a letter, of which Exhibit "B" to said interrogatories is a copy, on or about August 24, 1953. Said letter speaks for itself.

19. See No. 10 above.

20. Approximately 2,830,656 feet.

21. See No. 12 above.

22. See No. 13 above.

23. Approximately 2,611,301 feet.

24. Approximately 1,487,086 feet.

25. Approximately 1,124,215 feet.

26. Yes. See Nos. 10, 12 and 13 above.

27. Union received a letter, of which Exhibit "C" is a copy, on or about September 24, 1953. Said letter speaks for itself.

28. See No. 10 above.

29. Approximately 2,611,301 feet.

30. See No. 12 above.

31. See No. 13 above.

32. Approximately 2,940,300 feet.

33. Approximately 1,108,824 feet.

34. Approximately 1,831,476 feet.

35. Yes. See Nos. 10, 12 and 13 above.

36. Union received a letter, of which Exhibit "D" is a copy, on or about October 23, 1953. Said letter speaks for itself.

37. See No. 10 above.

38. Approximately 2,940,300 feet.

39. See No. 12 above.

40. See No. 13 above.

41. Approximately 3,555,417 feet.

42. Approximately 1,301,857 feet.

43. Approximately 2,253,560 feet.

44. Yes. See Nos. 10, 12 and 13 above.

45. Union received a letter, of which Exhibit "E" is a copy, on or about November 23, 1953. Said letter speaks for itself.

46. See No. 10 above.

47. Approximately 3,555,417 feet.

48. See No. 12 above.

49. See No. 13 above.

50. Yes.

51. Yes. See Nos. 10, 12 and 13 above and No. 55 below.

52. Union received a letter, of which Exhibit "F" is a copy, on or about January 23, 1954. Said letter speaks for itself.

53. Approximately 2,737,891 feet.

54. Approximately 2,737,891 feet.

55. On March 25, 1954, Union paid to Ward the amount of \$12,401.86 as payment in full for all logs removed from the Ward lands during the month of December, 1953. Thereafter Ward made demand on Union that there was still owing for logs re-

moved during the month of December the sum of \$2,364.49. Following the purported termination of said agreement by Ward, Ward made a claim against Union for an additional payment of \$1,281.87 instead of the \$2,364.49 previously demanded, for logs removed during the month of December, 1953. On May 21, 1954, Union tendered to Ward said sum of \$1,281.87, and said tender was refused by Ward. Union is ready, willing and able to pay said sum of \$1,281.87 if Ward will accept the same in performance of said agreement and without attempting to forfeit the rights of Union under said agreement.

56. No. See No. 58 below.

57. Union received a letter, of which Exhibit "G" to said interrogatories is a copy, on or about December 31, 1953. Said letter speaks for itself.

58. No. Said taxes were not paid only as the result of error and inadvertence. Payment of the first installment of said taxes was tendered to the Tax Collector of Humboldt County, but said Tax Collector wrongfully and improperly refused to accept said payment. Union is ready, willing and able to pay said taxes, plus any accrued interest and penalties, if Ward will accept said payment in performance of said agreement and without attempting to forfeit the rights of Union under said agreement. By such payment the Ward lands will be released from the lien of said taxes, and Ward is and will be without damage as the result of the non-payment thereof.

59. Approximately \$9,080.96.

60. The total quantity of logs removed from the Ward lands during the month of January, 1954, was 1,984,806 feet, for the month of February, 1954, 1,818,831 feet, for the month of March, 1954, 1,815,252 feet and for the month of April, 1954, 1,189,850 feet. Union has tendered to Ward payment for all of said logs removed at the rate of \$5.00 per M feet in accordance with the terms of said agreement, but each of said tenders has been refused. Union is ready, willing and able to make such payments if Ward will accept the same in performance of said agreement and without attempting to forfeit the rights of Union under said agreement.

61. Approximately 639,836 feet. Since the time of said purported termination of said agreement Union has tendered certain payments to Ward under said agreement, all of which have been refused, and Ward has advised Union that it will not accept any such tender. Union is ready, willing and able to pay for said logs in accordance with the terms of said agreement, if Ward will accept the payment in performance of said agreement and without attempting to forfeit the rights of Union under said agreement.

62. Approximately 270,728 feet. Since the time of said purported termination of said agreement Union has tendered certain payments to Ward under said agreement, all of which have been refused, and Ward has advised Union that it will not accept any such tender. Union is ready, willing and able to pay for said logs in accordance with the terms of said agreement, if Ward will accept the payment

in performance of said agreement and without attempting to forfeit the rights of Union under said agreement.

63. Yes.

64. It is impossible to determine the gross amount in dollars received for said logs, for the reason that said logs were intermingled with other logs on the sale thereof to third persons, and in most instances said third persons did not pay for the logs so sold on the basis of Union's scale thereof, but rather on the basis of their own scale which was lower than Union's scale.

65. No.

66. See 65 above.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Plaintiff and
Cross-Defendant.

State of California,
City and County of San Francisco—ss.

Edward V. Mills, Jr., being first duly sworn, deposes and says:

I am one of the attorneys for Union Bond & Trust Company, plaintiff and cross-defendant in the above-entitled action. I make this verification for the reason that there is no officer of said corporation in the county in which I maintain my office or available to make the same. I have read the foregoing answers to interrogatories and know

the contents thereof. The same were prepared from information given to me at my request by the officers and agents of said corporation, are true to the best of my knowledge and information, and I verily believe the same to be true.

/s/ EDWARD V. MILLS, JR.

Subscribed and sworn to before me this 10th day of August, 1954.

[Seal] /s/ SYLVIA KELLOGG,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 2, 1957.

Receipt of copy acknowledged.

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT

Comes Now Union Bond & Trust Company, a corporation, the plaintiff above named, and for cause of action against defendants, and each of them, shows as follows:

I.

Plaintiff Union Bond & Trust Company, a corporation was, at all times mentioned herein, and is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

II.

Defendant Blue Creek Redwood Company, Inc., was, at all times mentioned herein, and is a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California.

III.

Defendants Harold L. Ward, Frederick S. Strong, Jr., Marjorie W. Strong, Virginia Palmer Ward, John W. Strong, Marjorie Strong Russel, Rosamond Anne Strong Peters, Virginia Palmer Ward, Elizabeth Palmer Ward, Frederick S. Strong 3rd and Ann Ward were, at all times mentioned herein, and are citizens and residents of the State of Michigan.

IV.

Defendants First Doe, Second Doe, Third Doe, First Roe Company, Second Roe Company and Third Roe Company are sued herein by fictitious names for the reason that the true names of said defendants are unknown to plaintiff. Each of said fictitiously named defendants was, at all times herein mentioned, and is a citizen and resident of a state of the United States other than the State of Oregon.

V.

The matter in controversy herein, exclusive of interests and costs, exceeds the sum of \$3,000.

VI.

On or about May 1, 1946, defendant Blue Creek Redwood Company, Inc., made and entered into

with A. K. Wilson, that certain agreement dated May 1, 1946, wherein defendant Blue Creek Redwood Company, Inc., is named as Seller and A. K. Wilson is named as Purchaser, for the sale and purchase of certain land in the County of Humboldt, State of California, more particularly described in said agreement. A true copy of said agreement is attached to the original complaint on file herein, marked Exhibit "A," and is incorporated in this first amended complaint as fully as though set forth at length. Said agreement was thereafter, and on August 19, 1947, amended. A true copy of said amendment is attached to the cross-complaint on file herein, marked Exhibit "A," and incorporated herein as fully as though set forth at length. By assignment plaintiff Union Bond & Trust Company has acquired all the right, title and interest of said A. K. Wilson in and to said contract and said land. At all times since the date thereof said contract has been, and is now, in full force and effect. At all times herein mentioned plaintiff was, and now is, in the continuous and uninterrupted quiet and peaceable possession and occupancy of all of said land.

VII.

By a purported agreement each of said persons named in paragraph III hereof claims to have acquired a fractional part of the right, title and interest of said Blue Creek Redwood Company, Inc., in and to said agreement of May 1, 1946, and said land described therein. Said purported assignment

was, and is, a breach and default, and a material breach and default, under said agreement.

VIII.

By the terms of said agreement, and by the terms of paragraph 12 thereof, it is provided that if purchaser be in default under any term or provision of said agreement, and if such default continue for a period of sixty (60) days after written demand by seller for performance by purchaser, seller shall have as its sole remedy the right to cancel said agreement. By the terms of said agreement seller cannot otherwise terminate or cancel said agreement or the rights of purchaser thereunder. On or about May 12, 1954, defendants and each of them, served on plaintiff what purported to be a notice of cancellation of said agreement and of the rights of plaintiff thereunder as purchaser. At said time plaintiff was not in default under any term or provision of said agreement for a period of sixty (60) days after written demand by defendants, or any of them, and said notice of cancellation was contrary to the terms of said agreement, and said agreement has not been cancelled and terminated and the same is now in full force and effect. For the months June to October, 1953, inclusive, plaintiff received from defendants letters, purporting to be "notices of default." True copies of said letters are attached to the cross-complaint on file herein, marked Exhibit "B." Plaintiff paid to defendants, for logs removed during each of the months June to Octo-

ber, 1953, inclusive, the following amounts on the following dates: \$12,544.21, September 18, 1953; \$7,358.25, October 21, 1953; \$7,435.43, November 24, 1953; \$5,544.12, December 16, 1953; \$6,509.29, January 21, 1954. Said payments were tendered to defendants as performance in full under said agreement for all logs removed from said lands during each of the months of June to October, 1953, inclusive, and were tendered in full satisfaction of the claimed defaults under said agreement referred to in Exhibit "B" to said cross-complaint. Said payments were accepted by defendants unconditionally and without qualification, and at said times defendants were as fully advised as plaintiff as to the total quantity of logs removed from the said lands. At no time prior to the purported termination of said agreement by defendants, did defendants make any claim or demand on plaintiff for any further or additional payment of performance under said agreement for logs removed during any of the months of June to October, 1953, inclusive.

IX.

Said payments were tendered to defendants and accepted by defendants separately as to each month, as payments in full for all logs removed from said lands during the months of June to October, 1953, inclusive. At the times of such payments, and each of them, plaintiff believed that such payments were, and each was, in full for all logs removed during each of the months of June to October, 1953, inclusive, in accordance with the terms of said agree-

ment. After receipt of the claim by defendants, following the purported termination of said agreement, that additional amounts were due for logs removed during the months of June to October, 1953, inclusive, plaintiff caused an audit to be made of its books and records and only then was plaintiff advised that said payments did not include logs removed from said lands in the following quantities:

June—374,769 feet;

July—1,359,007 feet;

August—1,124,215 feet;

September—1,831,476 feet;

October—2,253,569 feet.

It was the intention of plaintiff at the time of each of said payments to pay for all logs removed, and payments were not made for the quantity of logs referred to above only as the result of error and inadvertence. Since the time of said purported termination of said agreement, plaintiff had tendered certain payments to defendants under said agreement, all of which had been refused, and defendants have advised plaintiff they will not accept any such tender.

X.

On March 25, 1954, plaintiff paid to defendants the amount of \$12,401.86 as payment in full for all logs removed from said lands during the month of December, 1953. Thereafter defendants made demand on plaintiff that there was still owing for logs removed during the month of December the

sum of \$2,364.49. Following the purported termination of said agreement by defendants, defendants made a claim against plaintiff for an additional payment of \$1,281.87, instead of the \$2,364.49 previously demanded, for logs removed during the month of December, 1953. On May 21, 1954, plaintiff tendered to defendants said sum of \$1,281.87, and said tender was refused by defendants.

XI.

By the terms of said agreement plaintiff is obligated to pay the taxes assessed against said lands. The first installment of taxes for the fiscal year 1953-1954 were not paid by plaintiff as the result of error and inadvertence. Payment of said first installment of taxes was tendered to the tax collector of Humboldt County, but said tax collector wrongfully and improperly refused to accept said payment.

XII.

Plaintiff admits that it has failed to make certain of the payments required to be made under said agreement. Plaintiff hereby offers to make all of said payments in full, and to make any other payments and comply with any order the court might make, and to do full and complete equity in the premises, as a condition to granting by the court relief from forfeiture under said agreement. Plaintiff is ready, willing and able to perform any and all of the terms and provisions of said agreement on its part to be performed.

XIII.

After said notice of termination, defendants, and each of them, by force and violence attempted to oust plaintiff of the possession of said property and did, on numerous occasions, restrain employees of plaintiff from entering on said property for the performance of their duties, and did induce the employees and agents of plaintiff to leave the service of plaintiff, and did induce contract carriers to leave the service of plaintiff and to breach their contracts with plaintiff, and attempted to induce persons indebted to plaintiff to refrain from paying such indebtednesses and did interfere with the business and operations of plaintiff on said land and otherwise, and said defendants conspired together to do each of said acts, and said acts were done and performed by defendants, and each of them, maliciously and wrongfully, and with the intent to injure plaintiff in its business, all to the damage of plaintiff in an amount in excess of \$100,000, the exact amount of such damage being as yet unascertained. Plaintiff prays leave to amend this complaint to insert herein the amount of such damage at such time as the same can be ascertained.

XIV.

By the terms of said agreement plaintiff is the equitable owner of said lands and property and is entitled to the possession thereof. Under said agreement legal title to said lands and property is retained by seller as security only for the payment of the purchase price therefor. The total purchase

price for all of the lands included in said agreement is the sum of \$750,000. To the date hereof, under and pursuant to the terms of said agreement there has been paid to seller thereunder by or for the account of purchaser the sum of \$594,240.78. Of said amount paid, the sum of \$25,000 was paid to seller on March 17, 1951, pursuant to the terms of paragraph 7 of said agreement. The remainder of said amount, being the sum of \$569,240.78 was paid to seller at various times pursuant to the terms of paragraph 2 of said agreement. In addition to the above payments, pursuant to the demand of seller, there was tendered to seller on or about May 21, 1954, the sum of \$1,281.87, and on or about June 3, 1954, the sum of \$18,989.05, and on or about June 17, 1954, the sum of \$9,102.82. Each of said payments was tendered as stumpage payments pursuant to the terms of paragraph 2(b) of said agreement, and each of said tenders was refused by defendants without the specification of any reason for the refusal thereof. No notice of default or demand for performance has been made by defendants to plaintiff for failure to make any payments provided to be made by the terms of paragraph 7 of said agreement.

XV.

The defaults of plaintiff under said agreement as hereinabove averred resulted solely through inadvertence and excusable neglect, and plaintiff is ready, willing and able to forthwith remedy any such default. Plaintiff is ready, willing and able to perform said agreement in all respects, and to pay

the purchase price for said property in full, and in accordance with the terms and provisions of said agreement. Defendants, by attempting to cancel said agreement and to terminate the rights of plaintiff in and to said property, have attempted to forfeit the rights and interests of plaintiff contrary to equity and good conscience and contrary to law. Any loss or damage suffered by defendants as the result of any default of plaintiff found to exist under said agreement is nominal only and is without prejudice to the rights of defendants under said agreement, and can be adequately compensated for by an award of damages herein.

XVI.

From the date of said agreement to the date hereof, the plaintiff has made substantial and valuable additions and improvements to said real property and to other real property owned by plaintiff and used in connection with said real property and has expended thereon considerable sums of money. Said additions and improvements have increased the present value of said property by an amount in excess of \$400,000.

XVII.

The present value of said lands exceeds the sum of \$1,000,000.

XVIII.

At the time of entering into the said agreement of May 1, 1946, plaintiff was negotiating for the purchase of adjacent lands with Sage Land & Lumber Company, Inc., and thereafter contracted with

said Sage Land & Lumber Company, Inc., to purchase said adjacent lands. During the course of said negotiations and prior to the execution of said agreements it was represented to plaintiff by defendant Harold L. Ward, President of Blue Creek Redwood Company, Inc., that there was then in existence an agreement between said Blue Creek Redwood Company, Inc., and said Sage Land & Lumber Company, Inc., for mutual and reciprocal right of ways over the lands of each of said companies to each of said other companies for the purpose of access to and conducting logging operations on the lands of each of said companies. It was further represented that said agreement for mutual and reciprocal right of ways would inure to the benefit of the purchaser of any of the lands of any of said companies. By the terms of said agreement for mutual and reciprocal right of ways, defendants are obligated to grant the plaintiff right of ways over and across any of the lands owned by defendants for the purpose of access to said adjacent lands purchased from said Sage Land & Lumber Company, Inc. Defendants have repudiated said agreement for mutual and reciprocal right of ways and are in breach thereof to the damage of plaintiff.

XIX.

Prior to the execution of said agreement of May 1, 1946, Blue Creek Redwood Company, Inc., sold to one G. L. Speier, by timber deed, certain of the fir and other species other than redwood on certain of the lands covered by said agreement of May 1,

1946. A copy of said timber deed is attached to said agreement of May 1, 1946, and is marked Exhibit "A" to said agreement. By the terms of paragraph 6(b) of said timber deed it is provided that said G. L. Speier was not to cut or remove any of the redwood timber from said lands, but any redwood timber felled or knocked down by said G. L. Speier in his operations were to be bucked by said G. L. Speier, but were to remain the property of seller thereunder. By the terms of said agreement of May 1, 1946, said redwood timber was, and became the property of plaintiff. Following the execution of said agreement of May 1, 1946, there was cut and removed from said land by said G. L. Speier redwood timber in excess of 160,000 feet. Plaintiff is informed and believes and on such ground avers that said redwood timber was removed from said lands for the account of said Blue Creek Redwood Company, Inc. By the terms of paragraph 2(d) of said agreement of May 1, 1946, said Blue Creek Redwood Company, Inc., was entitled to receive for said redwood logs only an amount equal to \$5.00 per M feet. Said redwood logs at the time of their removal as hereinabove set forth were the property of plaintiff and by the removal thereof, plaintiff has been damaged in an amount in excess of \$5,000.

XX.

By the provisions of paragraph 2 of said agreement of May 1, 1946, stumpage payments as provided in paragraph 2(d) in any year were a credit

against the minimum annual payment as provided in paragraph 2(c). In respect of the minimum annual payment of \$40,000 due on May 15, 1949, plaintiff was entitled to a credit against said payment for stumpage payments under said paragraph 2(d) in the amount of \$5,887.29, which defendants refused to allow. In respect of the minimum annual payment due on May 15, 1950, plaintiff was entitled to a credit against said minimum annual payment for stumpage payments under said paragraph 2(d) in the amount of \$13,125.33, which defendants refused to allow. To meet the demands of defendants and the threat of defendants to terminate said agreement plaintiff paid said amounts of \$5,887.29 and \$13,125.33 under protest, and said payments constitute an overpayment and advance payment by plaintiff to defendants and by the terms of paragraph 20 of said agreement said overpayments may be applied against any stumpage payments thereafter becoming due.

XXI.

Said agreement of May 1, 1946, was and is in truth and in fact a mortgage and was intended by both the seller and purchaser thereunder to be a mortgage only, and to stand as security for the payment of the purchase price of said land, and to serve no other purpose. Defendants have no right, title or interest in or to said property except as mortgagees thereof. Defendants, and each of them, claims the right, title and interest in and to said property in addition to their rights as mortgagees, and each of said defendants denies any right, title

or interest of plaintiff in and to said property. Said claims of defendants, and each of them, in and to said property, other than as mortgagees, are against the rights of plaintiff and are without foundation.

XXII.

If it be determined that the rights of plaintiff under said agreement and in and to said lands are forfeited, the defendants will be unjustly enriched at the expense of plaintiff.

Wherefore, plaintiff prays that it be declared that said agreement of May 1, 1946, is in full force and effect, and that defendants, and each of them, be ordered and directed to perform said agreement of May 1, 1946, according to the terms thereof; that the title of plaintiff in and to said property be quieted as against any and all claims of defendants, and each of them, subject only to said agreement of May 1, 1946; that it be declared and adjudged that plaintiff is the owner of said property and that defendants have no estate, right, title or interest in said property other than as mortgagees; that plaintiff be relieved of forfeiture under said agreement on such terms and conditions as to the court may seem just and equitable; that plaintiff have judgment against defendants, and each of them, for damages in an amount to be ascertained, if it be determined that the rights of plaintiff under said agreement and in and to said land is forfeited, for damages in the amount of unjust enrichment resulting to defendants, and for its costs of suit incurred

herein; and for such other, further and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 8, 1954.

[Title of District Court and Cause.]

AMENDMENT TO CROSS-COMPLAINT
ON ITS FACE

Leave of Court having been first obtained, the Cross-Complaint on file herein is amended in the following particulars: Page 11, line 21, commencing with the word "logs" to and including the number "\$70,313.74" on said line 21, are deleted, and the same are changed to read as follows: "Logs of the value of \$87,729.17."

HARDIN, FLETCHER, COOK
& HAYES,

CARLETON L. RANK,
HERMAN COOK;

By /s/ CARLETON L. RANK,
Attorneys for Defendants and
Cross-Complainants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 17, 1954.

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Come Now, defendants and cross-complainants, Harold L. Ward, Frederick S. Strong, Jr., Marjorie W. Strong, Harold L. Ward, Executor of the Estate of Virginia Palmer Ward, deceased; Frederick S. Strong, 3rd, John W. Strong, Marjorie Strong Russell, Rosamond Ann Strong Peters, Virginia Palmer Ward, daughter of Harold Lee Ward and Virginia Palmer Ward, deceased; Elizabeth Palmer Ward and Ann Ward, a minor, by and through her guardian Harold L. Ward, and answering plaintiff's First Amended Complaint on file herein, admit, deny and allege as follows:

I.

Answering Paragraph II of the First Amended Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, and in this connection, allege: That defendant, Blue Creek Redwood Company, Inc., was a Delaware corporation at the time of the making of the hereinafter alleged Agreement; that said corporation was dissolved under the laws of the State of Delaware on the 29th day of May, 1952, and for that reason answering defendants pray that the First Amended Complaint be dismissed as to said defendant Blue Creek Redwood Company, Inc.

II.

Answering Paragraph VI of the First Amended Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, commencing with the word "at" on line 17, page 3 of said First Amended Complaint, to and including the word "land" on line 21, page 3.

III.

Answering Paragraph VII of the First Amended Complaint on file herein, commencing with the word "said" on line 27, page 3, to and including the word "agreement" on line 29, page 3, these answering defendants deny each and every, all and singular, generally and specifically the allegations therein contained, and each and every part thereof, and in this connection allege that said assignment was acted upon and followed for all intents and purposes in the purported performance by plaintiff of the said Agreement of May 1, 1946, and was acted upon by said plaintiff to the knowledge of said defendants as though said Assignment were in all ways and manner effective for all purposes causing said defendants to rely upon such actions without inquiry as to the legal affect of said Assignment.

IV.

Answering Paragraph VIII of the First Amended Complaint on file herein, commencing with the word "at" on line 8, page 4, to and including the word "effect" on line 14, page 4, these defendants, and

each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof. Commencing with the word "said" on line 22, page 4, to and including the word "inclusive" on line 34 of page 4, these defendants, and each of them, deny each and every, all and singular, generally and specifically the allegations therein contained, and each and every part thereof.

V.

Answering Paragraph IX of the First Amended Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, except that these defendants do admit the allegations beginning with the word "said" on line 12, page 5, to and including the word "feet," line 18, page 5.

VI.

Answering Paragraph X of said First Amended Complaint on file herein, commencing with the word "on" on line 28, page 5, to and including the number "1953" on line 30, page 5, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, except that these defendants, and each of them, do admit that plaintiff paid to them the sum of \$12,401.86, and further admit that defendants refused plaintiff's tender of \$1,281.27.

VII.

Answering Paragraph XI of said First Amended Complaint on file herein, commencing with the word "as" on line 10, page 6, to and including the word "payment" on line 13, page 6, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, and in this connection allege that said failure to pay said taxes was not a result of error and inadvertence on the part of plaintiff.

VIII.

Answering Paragraph XII of said First Amended Complaint on file herein, commencing with the word "plaintiff" on line 21, page 6, to and including the word "performed" on line 23, page 6, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, and in this connection allege that they are informed and so believe, upon such information and belief, that plaintiff is not ready, willing and able to perform any and all of the terms and provisions of said Agreement on his part to be performed.

IX.

Answering Paragraph XIII of said First Amended Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof, and further deny that plaintiff has been

damaged in an amount in excess of \$100,000.00 or in any other amount, or at all.

X.

Answering Paragraph XIV of said First Amended Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, the allegations therein contained, and each and every part thereof, except that these defendants admit the total purchase price to be the sum of \$750,000.00, and further admit receiving payments on said total purchase price in the sum of \$585,869.82.

XI.

Answering Paragraph XV of said First Amended Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

XII.

Answering Paragraph XVI of said First Amended Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

XIII.

Answering Paragraph XVII of said First Amended Complaint on file herein, these answering defendants, and each of them, allege that they

have no information or belief upon the subject sufficient to enable them to answer said allegations, or any part thereof, and for that reason, and basing their denial on that ground, deny both generally and specifically, each and every, all and singular, the allegations therein contained, and each and every part thereof.

XIV.

Answering Paragraph XVIII of the First Amended Complaint on file herein, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

XV.

Answering Paragraph XIX of the First Amended Complaint on file herein, commencing with the word "Following" on line 1, page 10, to and including the figure "\$5,000.00" on line 12, page 10, these defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

XVI.

Answering Paragraph XX of said First Amended Complaint on file herein, these answering defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

XVII.

Answering Paragraph XXI of the said First Amended Complaint on file herein, these answering defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

XVIII.

Answering Paragraph XXII of the First Amended Complaint on file herein, these answering defendants, and each of them, deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

Wherefore, these answering defendants pray judgment as hereinafter set forth.

As and for a Second, Separate and Distinct Answer and Defense to the Allegations Contained in Paragraphs VII and VIII of Said First Amended Complaint on File Herein, These Answering Defendants Allege as Follows:

I.

In the fall of 1952, plaintiff was informed of the Assignment of the May 1, 1946, Agreement to defendants and subsequently thereto, had delivered to it a copy of the said Assignment and was exhibited by and through its counsel a true copy of the Power of Attorney authorizing defendants Harold L. Ward and Frederick S. Strong, Jr., to be and act as the duly authorized agents and Attorneys-in-fact of each of the defendants herein

named. That in December, 1952, plaintiff, by and through its counsel, was informed by defendants, by and through their counsel, that if there were any questions as to the legality of the Assignment or the Power of Attorney hereinabove referred to, defendants would accomplish any act requested by plaintiff to make such corrections and to take such steps as plaintiff may desire. That plaintiff, by and through its counsel, in December, 1952, advised defendants that if, upon examination by them, it determined that any steps were necessary to be taken in correction of any of the acts performed by said defendants in connection with said assignment or Power of Attorney, it would so notify defendants. Defendants to this day have received no word from plaintiff concerning any requirements that it may have and in reliance upon such silence, defendants took no steps to make any changes concerning said Assignment and Power of Attorney until after the commencement of this action. That at all times since December, 1952, plaintiff has acted pursuant to the notification of said Assignment and in accordance with the instructions of the aforesaid Attorneys-in-fact for these defendants, and has made payments to said Attorneys-in-fact under the Contract of May 1, 1946, and has further discussed other facets of the said May 1, 1946, Agreement with the said Attorneys-in-fact, and has in all ways purported to act in its purported performance of said May 1, 1946, Agreement, as though said Assignment and Power of Attorney were at all times legally effective and in

full force and effect for all purposes under the terms of said Agreement; that plaintiff intended for defendants, and each of them, to so rely; that by reason of defendants' reliance upon the said actions of said plaintiff, as hereinabove alleged, plaintiff should now be estopped to deny the legal effectiveness of either of said documents.

Wherefore, defendants, and each of them, pray that plaintiff take nothing by its First Amended Complaint; that defendants be hence dismissed with their costs of suit incurred herein, and for such other and further relief as to this court may seem proper.

CARLETON L. RANK, Esq.,

HERMAN COOK, Esq.,

HARDIN, FLETCHER, COOK
& HAYES,

By /s/ CARLETON L. RANK,

Attorneys for Defendants and
Cross-Complainants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 18, 1954.

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

This diversity case¹ poses the troublesome question of the nature and extent of the power of this Court, under uncertain California law, to mold a just and appropriate equity decree.

The assignors of the parties litigant, in May of 1946, entered into a timber purchase contract. The contract vendee agreed to purchase from the vendor certain timber lands for a price of \$750,000 to be paid out of the proceeds of timber cut, with certain fixed minimum payments.

Their assignees proceeded under the contract. All went reasonably² well until \$585,000 had been paid by vendees. Then certain defaults of the vendee (found by the Court to be wilful) occurred.

Plaintiff, assignee of the vendee, filed this action for a judgment declaring the contract to be in full force and effect and requiring specific performance of the vendor. Defendants, assignees of vendor, by answer, prayed that plaintiff be declared in default under the contract, and, by cross-complaint, prayed

¹28 USC 1332.

²There is some evidence of delays in payment and other dilatory tactics of vendee under the contract. These are not necessary to be considered in determining the issues presented.

for damages caused by the default and also that their title to the timberland be quieted.

At the trial, the evidence showed that plaintiff was in default and that the default had continued for more than 60 days after plaintiff had been notified in writing by defendants of the default. The evidence further showed that on May 12, 1954, defendants notified plaintiff by letter that the contract was cancelled. The notice of cancellation accorded with paragraph 12 of the contract which provided that in the event the vendee should continue in default for more than 60 days after written demand by the vendor for performance, the vendor was entitled to resume possession of the property, retain all payments made by the vendee and cancel the contract by notice. The contract also provided that time was of the essence.

It is clear, and the parties agree, that under California law, which governs by express stipulation of the contract and because this is a diversity suit, plaintiff is entitled to relief from any forfeiture imposed by the contract for his default. The point in issue is the form such relief should take. Plaintiff urges that relief can best be afforded by ordering a conveyance of the land to him upon his immediate payment of the balance of the purchase price as well as any damages to defendants resulting from the default. Defendants contend that plaintiff's default was wilful, and that a vendee in wilful default cannot be given the benefit of his bargain, but

at most is entitled to restitution of any payments made in excess of the damages to the vendor.

Three California Code sections are pertinent:

Section 1492. Compensation After Delay in Performance. Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime.

Section 3275. Relief in Case of Forfeiture. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty.

Section 3369.

1. Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case * * *

Section 1492, specifically authorizes the kind of relief requested by plaintiff. But it is unavailing here, because, by its terms, it is not applicable to contracts which declare time to be of the essence, as is the case here.

Whether Sections 3275 and 3369 are applicable here, depends upon how they have been construed by the California Courts.

The early California cases, either overlooking or ignoring these Code sections, applied a strict rule of forfeiture against vendees defaulting under contracts declaring time to be of the essence. In 1898, the case of *Glock v. Howard*, 123 Cal. 1, without reference to either Code section, established the rule that a defaulting vendee seeking restitution of payments made under a contract declaring time to be of the essence could not recover in the absence of an equitable showing of surprise, mistake, or fraud. Similarly in quiet title actions, the Courts, without consideration of Section 3369, which prohibits granting specific relief to enforce a forfeiture, quieted title against defaulting vendees without requiring restitution of payments made³. Significantly, however, in these quiet title actions, the Courts, although not requiring restitution, in some instance conditioned the decree quieting title upon the vendee's failure to complete performance under the contract and compensate the vendor for damages within a specific period⁴. Thus even in the days

³*Oursler v. Thacher*, 152 Cal. 739 (1908); *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170 (1916); *Myers v. Williams*, 173 Cal. 301 (1916); *Fresno Irrigated Farms Co. v. Canupis*, 39 Cal. App. 184 (1918); *Ross v. Gentry*, 94 Cal. App. 742 (1928).

⁴*Fairchild v. Mullan*, 90 Cal. 190 (1891); *Southern Pac. R.R. v. Allen*, 112 Cal. 455 (1896); *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255 (1899).

when the rights of defaulting vendees were at their lowest ebb in California, it apparently was within the Court's discretion to afford the vendee an opportunity to carry out the contract before quieting title against him.

The California Courts soon modified their strict rule of forfeiture by holding it inapplicable when the vendor had waived or was estopped to assert the time provisions of the contract⁵, or had allowed the entire price to become due without declaring a forfeiture⁶. In some cases, the Courts invoked Section 3275 to grant relief to the vendee. But even in these cases, the Courts justified the application of the statute by a finding that the vendor had waived or was estopped to assert the time provisions of the contract⁷, or that the vendee had breached a condition subsequent rather than a condition precedent as in the Glock case *supra*⁸.

⁵Boone v. Templeman, 158 Cal. 290 (1910); Stevinson v. Joy, 164 Cal. 279 (1912); Hayt v. Bentel, 164 Cal. 680 (1913).

⁶Boone v. Templeman, *supra* note 5; Hayt v. Bentel, *supra* note 5; Kerr v. Reed, 187 Cal. 409 (1921); Bank of America v. Ries, 128 Cal. App. 75 (1932).

⁷McDonald v. Kingsbury, 16 Cal. App. 244 (1911); Bedell v. Barber, 80 Cal. App. 2d 806 (1947); Flanery v. Mudd, 86 Cal. App. 2d 250 (1948).

⁸Ebbert v. Mercantile Trust Co., 213 Cal. 496 (1931).

In 1949, in *Barkis v. Scott*, 34 Cal. 2d 116, the California Supreme Court applied Section 3275 to relieve a vendee who had breached a condition precedent under a "time of the essence" contract, in the absence of a waiver by the vendor. The Court distinguished the *Glock* case on the ground that it appeared from the facts of that case that the vendee could not have qualified for relief under Section 3275. Thus *Barkis* has established the rule that a defaulting vendee, who meets the requirements of Section 3275, can be relieved from forfeiture even though the vendee has breached a condition precedent and there has been no waiver of provisions of the contract making time of the essence. Moreover, the Supreme Court did not grant relief merely by ordering restitution of the payments made, but rather it sanctioned the restoration of the vendee to his rights under the contract. Indeed, the Court indicated that this form of relief would ordinarily be preferable to restitution. The Court said in this regard, at 34 Cal. 2d 121, "A vendee in default who is seeking to keep the contract alive, however, is in a better position to secure relief than one who is seeking to recover back the excess of what he has paid over the amount necessary to give the vendor the benefit of his bargain after performance under the contract has terminated. In the latter situation it may be so difficult to compute the vendor's damages that the vendee will be unable to prove that the vendor will be unjustly enriched by allowing him to keep all the money that has been paid. (Cases cited.) * * *

On the other hand, when the de-

fault has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so. In this situation, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his contract, permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeiture. Accordingly, relief will be granted whether or not time has been made of the essence.

Thus it is clear that a vendee who meets the requirements of Section 3275 may be relieved from any forfeiture either by restoring him to his rights under the contract, or as cases subsequent to *Barkis* have established⁹, by awarding him restitution of payments made in excess of the vendor's damage. Had the plaintiff here been able to qualify for relief under Section 3275, the form of relief which he seeks could be granted under that Section. But, as defendants assert and as the evidence showed, plaintiff fails to qualify because his default was wilful within the meaning of Section 3275.

An alternative basis for the relief sought by plaintiff is indicated, however, by the decision of the California Supreme Court in *Freedman v. The Rector*, 37 Cal. 2d 16 (1951), some two years after the *Barkis* decision. In the *Freedman* case, the

⁹See *Baffa v. Johnson*, 35 Cal. 2d 36, at 38 (1950).

vendee under an installment contract for the purchase of land sued for specific performance. The trial Court found that the vendee was in wilful default and therefore not entitled to relief under Section 3275 and gave judgment for the defendant vendor. On appeal, the Supreme Court agreed that relief under Section 3275 was precluded, but held that Section 3275 was not exclusive, but merely permissive, and that an alternative basis for the relief of a vendee in wilful default is provided by the damage provisions of the Civil Code and by the policy of the law against penalties and forfeitures.

The damage provisions of the Civil Code referred to by the Court are Section 3294¹⁰, which provides for exemplary damages for the breach of certain obligations not arising from contract, and Sections 1670 and 1671¹¹, which validate contractual provi-

¹⁰Section 3294. "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

¹¹Section 1670. "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Section 1671. "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

sions for liquidated damages in situations where it would be impracticable or extremely difficult to fix the actual damage. It would be inconsistent with these provisions, the Court said, to permit what are, in effect, punitive damages merely because a party has partially performed his contract before his breach. Section 3294 expresses the policy of the law against the allowance of exemplary damages for breach of contract regardless of the nature of the breach. Sections 1670 and 1671 prevent the enforcement of a provision for the forfeiture of installment payments as a valid provision for liquidated damages, when it would not be impracticable or extremely difficult to fix the actual damages.

The Court in *Freedman* also stated that to deny the vendee relief, because his breach is wilful, would create an anomalous situation when considered with Section 3369 of the Civil Code, *supra*, which provides that "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case." That Section, the Court said, "precludes the Court from quieting the vendor's title unless he refunds the excess of the part payments over the damage caused by the vendee's breach. Unless the same rule is adopted when the vendee seeks restitution, the rights of the parties under identical fact situations will turn on the chance of which one first seeks the aid of the court."

In *Freedman*, the Supreme Court held that the defaulting vendee was entitled to restitution of payments made in excess of the vendor's damage. Relief

in the form of specific performance was necessarily denied the vendee, however, since the trial court had found that the vendee had, apart from his default, rescinded the contract, and that, before the rescission was revoked, the vendor had sold the property to another.

Under the Freedman rule it is clear that the plaintiff here, even though in wilful default, is at least entitled to relief in the form of restitution of payments made in excess of the defendants' damage. The pertinent remaining question is whether the Freedman rule is broad enough to permit relief in the form of an opportunity to complete the contract, upon compensating the defendants for their damage. The refusal of the court to grant such relief in the Freedman case does not preclude it here since in Freedman the vendee had, apart from his default, rescinded the contract and the property was thereupon sold to another. The grounds upon which the Court in Freedman allowed restitution should equally justify relief in the form of an opportunity to complete the contract in a proper case.

The basis upon which the Court afforded relief in Freedman was the code sections expressing a policy against permitting forfeitures or exemplary damages for breach of contract. These sections, the Court said, require that a vendee in wilful default be relieved from any forfeiture, just as Section 3275 permits relief to be accorded a vendee whose default is not wilful. But these Code sections do not pre-

scribe the form such relief should take any more than does Section 3275. In granting relief from forfeiture under Section 3275, in *Barkis, supra*, the Supreme Court seemed to take it for granted that a proper method, and indeed the preferable one, was to permit the vendee to carry out the contract.

Defendants here urge that a vendee in wilful default should not be relieved from a forfeiture by permitting him to complete performance under the contract, because he would then be receiving the benefit of his bargain. But, this argument amounts to no more than the contention that the Court should punish a vendee in wilful default by denying him an opportunity to complete the contract, even though in some manner it must relieve him from the forfeiture. Yet the policy against the imposition of a penalty for breach of contract is the very basis for the holding in *Freedman* that a vendee in wilful default must be relieved from any forfeiture. Certainly, then, the determination of the form such relief should take should not be conditioned by a purpose to penalize the vendee.

The California Supreme Court also said in *Freedman* that the rights of the vendor and vendee should not turn on the chance of which one first seeks the aid of Court. The Court stated that Section 3369 of the Civil Code prohibiting the enforcement of forfeiture precludes a Court from quieting the vendor's title unless he refunds the excess of the part payments over his damages. The same rule, the

Court said, should be followed when the vendee seeks restitution.

But, as has been noted, the California Courts previously had paid no heed to Section 3369 in quiet title actions and had entered decrees quieting title without requiring restitution. They had, however, in some instances given the vendee an opportunity to complete the contract; and it appears to be the established rule that it is within the discretion of the Court to do so¹². Thus if the vendee is to have the same rights when he invokes the aid of the Court, as when the vendor seeks to quiet title, the Court should have the discretion in either situation to give the vendee an opportunity to complete the contract.

¹²See *Los Angeles Auto Tractor Co. vs. Superior Court*, 94 Cal. App. 433 (1928); *Veterans' Welfare Board vs. Burt*, 4 Cal. App. 2d 659 (1935). In the recent case of *Nelson vs. Dangerfield*, 125 Cal. App. 2d 146 (1954), the trial court entered a judgment quieting the plaintiff vendor's title against the vendee, in default, unless within 60 days the vendee paid the delinquent payments and taxes. On appeal, the District Court of Appeals approved the judgment insofar as it went, but held, citing *Freeman vs. The Rector*, 37 Cal. 2d 16, that the trial court should not have denied the vendee restitution of any payments made in excess of the damage to the vendor. Apparently the Court of Appeals meant that the trial court should have conditioned the decree quieting title, not only so as to give the vendee an opportunity to complete the contract, but also to give the vendee restitution of any payments made in excess of the vendor's damage, in the event the vendee was unable to carry on under the contract within the time specified in the judgment.

While this view has not been precisely stated by the highest Courts of California, I am of the opinion that they would so hold if called upon to resolve the facts of this case¹³. Barkis and Freedman point the way towards that end¹⁴.

¹³Federal Courts in diversity cases are "called upon to determine as best we may what the highest court of California would hold if confronted with the controversy now presented to us"; *Compania Engraw vs. Schenley*, 9 Cir., 181 F. 2d, 876, 879. See also *Hughes vs. Mutual Life Ins. Co.*, 9 Cir., 180 F. 2d, 542; *California vs. Renauld*, 9 Cir., 179 F. 2d, 605.

¹⁴For discussions of the development of the law in California in respect to the rights of defaulting vendees and the effect of the Barkis and Freedman decisions see:

- 18 California Law Review 681 (1930);
- 20 California Law Review 194 (1932);
- 27 California Law Review 583 (1939);
- 37 California Law Review 704 (1949);
- 2 Stanford Law Review 235 (1949);
- 23 Southern California Law Review 110 (1949);
- 40 California Law Review 593 (1952).

Addendum to footnote 14.

After submission of this cause, counsel for defendants called the attention of the court to the recent decision of the California Supreme Court in *Bird vs. Kenworthy*, 43 A.C., 676, November 30, 1954. In that case, after the vendor of certain tractors sold under a conditional-sales contract had repossessed them for a default in payments, the vendee sued for rescission of the contract or for relief from forfeiture. The trial court gave judgment for the defendant vendor, and this judgment was affirmed by the Supreme Court on the appeal. The Supreme Court agreed that the asserted ground for rescission

Some of the considerations which might enter into the exercise of the Court's discretion were indicated by the Supreme Court in *Barkis*. The Court noted that in some cases it would be difficult to compute the vendor's damages if the contract were terminated. The Court suggested, that if the vendee were able and willing to complete the contract, and had made substantial part performance, or substantial improvements on the property, completion of the contract would best protect the rights of the parties.

In the present case, the plaintiff has made substantial payments under the contract and has made substantial improvements on the property. Because of conflicting estimates of value, the vendor's damages may be difficult to determine, if the contract is ter-

of the contract—that the vendor had wrongfully repossessed the tractors—had not been established. Upon the issue of relief from forfeiture, the Supreme Court sustained the finding of the trial court that the vendee was guilty of a wrongful default, which precluded the application of Section 3275 of the Civil Code. As well, the Court approved the finding that the rental value of the tractors while in the vendee's possession exceeded the payments forfeited under the contract. Consequently, the Court held, no forfeiture was incurred which required relief under the Freedman rule.

Since in *Bird* there was no forfeiture requiring relief, that case affords no guidance in determining the nature of the relief that may be granted in a case such as the present one, where there would be a forfeiture requiring relief.

[Addendum to footnote 14]: Endorsed and filed Feb. 16, 1955.

minated. Consequently, the just and equitable course would appear to be to enter a preliminary decree permitting plaintiff to complete the contract within a specified time by paying the entire purchase price together with the defendants' damages resulting from the delay in performance.

Accordingly, an interlocutory decree will be entered as follows:

(1) The plaintiff may complete the contract of purchase by paying the entire unpaid purchase price within 60 days from date hereof.

(2) Within 10 days thereafter the Court will hear evidence as to defendants' damage, limited to:

(a) interest on past-due payments;

(b) cost of investigating plaintiff's defaults; and,

(c) costs and expenses of suit and trial, including reasonable attorney's fees.

Final decree will then enter adjudging the amount of damages due defendant.

(3) In the event plaintiff fails to pay the unpaid purchase price within the time specified in (1), the Court will enter an interlocutory decree quieting vendor's title to the property and within 10 days thereafter, will hear any further evidence and/or argument the parties wish to present as to the amount of restitution to be made to the plaintiff and will thereupon enter final decree adjudging the rights and liabilities of the parties.

Counsel will present findings and interlocutory decree within 10 days.

Dated: February 10, 1955.

[Endorsed]: Filed February 10, 1955.

[Title of District Court and Cause.]

ENGROSSED FINDINGS OF FACT AND CON-
CLUSIONS OF LAW AND INTERLOCU-
TORY DECREE

This cause having come on duly and regularly for trial, evidence both oral and documentary having been introduced, the parties having made certain stipulations, the cause having been submitted and the Court having considered the same, the Court finds the facts and states its conclusions of law as follows:

Findings of Fact

1. (a) Plaintiff was and is an Oregon Corporation.

(b) Defendant Blue Creek Redwood Company, Inc., was a Delaware corporation, and was dissolved prior to the commencement of this action. All of the assets of Blue Creek Redwood Company, Inc., on its dissolution, were transferred to the individually-named defendants.

(c) All of the individually named defendants were and are citizens and residents of the State of

Michigan. After the commencement of this action, defendant Virginia Palmer Ward, wife of Harold L. Ward, died, said defendant Harold L. Ward is the executor of the last will and testament of said Virginia Palmer Ward, and as such executor was substituted as a party herein in the place and stead of said Virginia Palmer Ward. Defendant Harold L. Ward was substituted as a party herein as guardian for defendant Ann Ward in the place and stead of said Virginia Palmer Ward.

(d) The matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

2. Blue Creek Redwood Company, Inc., as Seller, and A. K. Wilson, as Buyer, entered into that certain agreement dated May 1, 1946, for the sale and purchase of certain timber lands in the County of Humboldt, State of California, more particularly described in said agreement. A true copy of said agreement is attached to the complaint on file herein, marked Exhibit "A." On August 19, 1947, said agreement was amended, and a true copy of said amendment is attached to the cross-complaint on file herein, marked Exhibit "A." Thereafter the rights of Seller under said agreement were assigned to defendants and the rights of purchaser under said agreement were assigned to plaintiff.

3. The total purchase price for said lands was the sum of \$750,000.00, being the sum of \$600,000.00 for the land described in Paragraph 1 of said agreement, and the sum of \$150,000.00 for the land described in Paragraph 7 of said agreement. Title to

said land was retained by Seller until the full purchase price was paid. The agreement provided that Purchaser was to make certain cash payments before removing any timber from said land, and thereafter Purchaser could cut and remove timber. The agreement provided for certain minimum annual payments. As logs were removed from the said land, Purchaser was to report the quantity of logs removed and pay Seller on account of the purchase price at the rate of \$5.00 per M feet of logs removed. Such reports and payments were to be made on or before the 20th day of each month in respect of logs removed during the preceding calendar month. At the time of execution of said agreement Purchaser went into possession of said land and thereafter continued in possession, and was in possession of all of said land on May 12, 1954, and has continued in possession to the present time. Since 1948 plaintiff, for its own account, and through its licensees and contractors, has conducted logging operations on said land and has cut and removed timber therefrom and has constructed and used roads on, over and across said land. No timber or logs have been cut or removed on or from said land since May, 1954, but plaintiff has continued to the present time to use the roads on said land in conducting logging operations on and hauling logs from other lands.

4. In accordance with the terms of said agreement, plaintiff has paid to Seller on account of the purchase price for said land the sum of \$182,503.61

as down payments and balance of minimum annual payments. In accordance with the terms of said agreement, plaintiff has paid to Seller on account of the purchase price of said land the sum of \$403,-356.36 at the rate of \$5.00 per M feet of logs removed from said land. The total amount paid by plaintiff to Seller on account of the purchase price for said land is the sum of \$585,859.97.

5. Said agreement provided that if Purchaser be in default under any term or provision thereof, and if such default continue for a period of sixty days after written demand by Seller for performance by Purchaser, Seller shall have the right to resume possession of the property, retain all payments made by Purchaser and cancel the contract by written notice of cancellation. Said agreement also provided that time was of the essence.

6. Under date of July 21, 1953; August 21, 1953; September 22, 1953; October 21, 1953, and November 21, 1953, defendants notified plaintiff in writing of plaintiff's failure to report the quantity of logs removed from said lands during each of the months of June to October, 1953, respectively, and the failure to make payments on account of the purchase price at the rate of \$5.00 per M feet of logs removed during said months, by the 20th day of the succeeding calendar month. On January 21, 1954, defendants notified plaintiff in writing of plaintiff's failure to report the quantity of logs removed during the month of December, 1953, and the failure to make payment on account of the purchase price at the rate of \$5.00 per M feet of logs removed during

said month, on or before January 20, 1954. For each of said months June to October, 1953, inclusive, and in response to said written notices for each of said months, plaintiff reported quantities of logs removed and paid to defendants on account of the purchase price at the rate of \$5.00 per M feet of logs so reported the following amounts on the following dates: \$12,544.21 on September 18, 1953; \$7,358.25 on October 21, 1953; \$7,435.43 on November 24, 1953; \$5,544.12 on December 16, 1953; and \$6,509.29 on January 21, 1954. For the month of December, 1953, and in response to said written notice for said month, plaintiff reported the quantity of logs removed and paid to defendants on account of the purchase price at the rate of \$5.00 per M feet of logs so reported the sum of \$12,401.86 on March 27, 1954. Each of said payments was accepted by defendants and retained by them. No other demand for payments for the months of June to October, 1953, inclusive, was made by defendants to plaintiff until May 13, 1954. On April 15, 1954, defendants demanded of plaintiff an additional payment of \$2,364.49 for the month of December, 1953. On May 13, 1954, defendants made demand on plaintiff for an additional payment of \$1,281.87 for the month of December, 1953.

7. The reports above referred to of logs removed during the months of June to October, 1953, inclusive, did not include logs removed during each of said months, and plaintiff failed to make payments on account of the purchase price at the rate of \$5.00

per M feet of logs removed during each of said months, and during the month of December, 1953, as follows:

June—374,769 ft.	\$1,870.00
July—1,359,007 ft.	6,795.00
August—1,124,215 ft.	5,620.00
September—1,831,476 ft.	9,155.00
October—2,253,569 ft.	11,275.00
December—256,374 ft.	1,281.87

The total amount payable for said months, which plaintiff failed to pay, was the sum of \$35,996.87.

8. By the terms of said agreement plaintiff agreed to pay taxes assessed against said land. Under date of December 29, 1953, defendants notified plaintiff in writing of its failure to pay the first installment of 1953-1954 taxes assessed against the land. Plaintiff did not pay such taxes.

9. On April 2, 1954, defendants notified plaintiff in writing of its failure to report the quantity of logs removed during the months of January and February, 1954. and the failure to make payments on account of the purchase price at the rate of \$5.00 per M feet of logs removed during said months by the 20th day of the following month. On April 21, 1954, defendants notified plaintiff in writing of its failure to report the quantity of logs removed during the month of March, 1954, and the failure to make payment on account of the purchase price at the rate of \$5.00 per M feet of logs removed during said month, by the 20th day of April, 1954.

10. On May 12, 1954, defendants gave written notice to plaintiff that said agreement and the rights of plaintiff thereunder were cancelled.

11. Plaintiff tendered to defendants as payments on the purchase price the following amounts on the following dates: \$1,281.87 on May 21, 1954; \$18,989.05 on June 3, 1954; \$9,102.82 on June 17, 1954; and \$5,950.00 on July 23, 1954. Each of said tenders was refused by defendants.

12. Plaintiff has made substantial and valuable additions and improvements to said lands.

13. The termination of plaintiff's rights under said agreement and in and to said land would result in a forfeiture and penalty against plaintiff.

14. Defendants have failed to prove any facts which would justify the granting of an injunction against plaintiff.

15. It is not necessary to determine certain of the issues herein for the purposes of an interlocutory decree, and the Court reserves jurisdiction to hear further evidence on such issues and/or to make findings of fact thereon at the appropriate time.

Conclusions of Law

1. Plaintiff's defaults were wilful within the meaning of Section 3275 of the Civil Code of the State of California.

2. The termination of plaintiff's rights under said agreement and in and to said lands would result in a forfeiture and penalty.

3. Justice and equity require that plaintiff be permitted to complete the contract by paying the entire purchase price, together with defendants' damages resulting from the delay in performance.

Decree

It Is Now, Therefore, Ordered, Adjudged and Decreed as follows:

(1) The plaintiff may complete the contract of purchase by paying the entire unpaid purchase price within 45 days from date hereof. The plaintiff may comply with this provision of the decree by depositing with the Clerk of the Court, within the time specified, a bank cashier's check or certified check in favor of Harold L. Ward and Frederick S. Strong, Jr., attorneys in fact.

(2) Within 10 days thereafter the Court will hear evidence as to defendants' damage, limited to

(a) interest on past due payments;

(b) cost of investigating plaintiff's defaults;
and

(c) costs and expenses of suit and trial including reasonable attorney's fees.

Within ten days after filing of the Court's order fixing such damages, the plaintiff shall deposit with the Clerk of the Court a bank cashier's check or certified check in favor of Harold L. Ward and Frederick S. Strong, Jr.,

attorneys in fact, for the amount of the damages so fixed.

Final decree will then enter adjudging the amount of damages due defendant.

(3) In the event plaintiff fails to pay the unpaid purchase price within the time specified in (1) and/or damages specified in (2) within the time specified, in the manner herein specified, the Court will enter an interlocutory decree quieting vendor's title to the property and within 10 days thereafter will hear any further evidence and/or argument the parties wish to present as to the amount of restitution to be made to the plaintiff and will thereupon enter final decree adjudging the rights and liabilities of the parties.

The Court reserves jurisdiction herein to make such further orders or decrees as may be appropriate.

Dated: March 8, 1955.

/s/ LOUIS E. GOODMAN,

Judge, United States District
Court.

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Cause.]

ORDER FIXING DEFENDANTS' DAMAGE
PURSUANT TO PARAGRAPH 2 OF IN-
TERLOCUTORY DECREE

Having heard evidence as to defendants' damage, as provided in paragraph 2 of the interlocutory decree herein, and counsel having argued and briefed the questions relating to the amount and nature of such damage, the Court does hereby fix and determine the damages of the defendants as follows:

(1) Interest:

The amounts and due dates of past due payments required to have been made by the plaintiff to the defendants are not in dispute. Plaintiff claims that certain past due payments were tendered and that interest on such past due payments should not be payable from the date of such tenders. The Court finds that such tenders were not unequivocal in their nature and that the defendants are entitled to interest from the due date of all past due payments. The Court fixes the rate of interest at 5% per annum. Defendants' claim for interest on the entire unpaid balance of the contract is disallowed.

Wherefore, plaintiff will deposit a sum equivalent to 5% per annum on all past due payments from the due date of such payments to April 21, 1955.

(2) Attorneys' Fees.

After consideration of the evidence and the arguments with respect to attorneys' fees to be awarded to the defendants, the Court determines that the sum of \$20,000 is a fair and just amount under all the circumstances to be allowed to the defendants for the services of their attorneys.

(3) Cost of investigating plaintiff's defaults and costs and expenses of suit and trial.

From the evidence at the hearing, the Court is unable to adequately separate a number of the items claimed as damages as between (1) cost of investigating defaults and (2) costs and expenses of suit and trial. It will, therefore, make its determination of these items under one heading.

The cost of investigating the defaults and the cost of suit and trial fall into three categories, as claimed by the defendants, as follows:

(a) Ward's expense:

The total of Ward's expenses claimed is \$2916.99. Of this sum \$2053.80 is for hotel bills and transportation expenses. In addition Ward asks for an unitemized total of \$863.19 which he denominates as "personal expenses." Although this latter amount is in no way particularized, the Court will not disallow the entire item on that ground. Upon the assumption that some part of this sum is reasonably within the category of relevant expense, it will allow the sum of \$300.00, which is at the rate of \$5.00 a day for 60 days away from home. The total amount allowed for Ward's expenses is the sum of \$2353.80.

(b) Attorney Rank's expense:

Of the amounts claimed to have been expended by Attorney Rank, the following are allowed:

Reporters' fees for depositions and trial	\$3,130.45
Telephone and telegraphic expenses ..	434.24
Transportation expenses	415.01
Bond re writ of attachment and marshal's fees	596.00
Misc. expenses, such as photostats and abstracts	292.83
Hotel bills	584.62

(The item of \$358.94, for a room at the Whitcomb Hotel for the lawyers during the trial, is disallowed. It was not used for living purposes.)

(The item of cash advances to Attorney Rank, \$2,659.13, is disallowed, inasmuch as each of the items making up this total is charged merely to "cash." No itemization of the nature of these "expenses" is made.)

The total amount allowed, therefore, as expenses of Attorney Rank is the sum of \$5,453.15.

(c) "French" expense:

It is fair and just to say that some substantial portion of the services rendered by French is probably chargeable to plaintiff as investigative and trial preparation expense. The evidence is so unclear on this subject, however, that no precise apportion-

ment of such services can be made. Therefore, the best and fairest estimate that the Court can make, on the basis of the evidence presented, is to allow as an expense item, 50% of the so-called French accounts 364a and 380, for the period May to December, 1954, as to account 364a, and February to December as to account 380, or the total sum of \$2,974.81.

Wherefore, in accordance with paragraph 2 of the interlocutory decree, filed March 8, 1955, the plaintiff shall deposit with the Clerk of the Court, within 10 days after the filing of this order, a bank cashier's check or a certified check in favor of Harold L. Ward and Frederick S. Strong, Jr., Attorneys in fact, in the sum of \$30,781.76, plus the amount of interest calculated in accordance with paragraph (1) of this order.

Plaintiff has moved to vacate and discharge the writ of attachment issued herein on behalf of the defendants under which certain real properties of the plaintiff were levied upon and attached. The defendants have opposed this motion on the ground that the priority of the lien of the attachment will not be protected in the event that the defendants elect not to accept the fund deposited pursuant to the interlocutory decree and to be deposited pursuant to this order, and appeal to the Court of Appeals from the final decree herein. The Court is of the opinion that the rights of the parties in that regard may be adequately protected in such event by an order of this Court, vacating the attachment,

and transferring the lien of the attachment, as of the date thereof, to the funds of the plaintiff on deposit with the Clerk of this Court. The Court will appropriately so Order in the final decree to be entered herein, when and if such decree is made.

Dated: August 8, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

ORDER

It appearing to the Court and the Court finding:

1. Plaintiff has heretofore complied with the provisions of paragraph 1 of the interlocutory decree made and entered herein on March 8, 1955.
2. The Court has heretofore on August 8, 1955, made and entered its order fixing the amount of defendants' damage pursuant to the provisions of paragraph 2 of said interlocutory decree.
3. Plaintiff desires to comply with the provisions of paragraph 2 of said interlocutory decree and said order of August 8, 1955, and in partial compliance therewith plaintiff has deposited with the Clerk of this Court a bank cashier's check payable to Harold L. Ward and Frederick S. Strong, Jr., attorneys in fact, in the amount of \$13,986.55.

4. There is on deposit with the Bank of America, NT&SA, Arcata Branch, Arcata, California, for the account of plaintiff the sum of \$21,528.30. There has heretofore been issued herein to defendants and cross-complainants a writ of attachment against the property of plaintiff, and pursuant thereto, and at the request and direction of defendants and cross-complainants, said monies on deposit with said bank for the account of plaintiff were levied upon and attached on June 3, 1954. Since said date said bank has held, and now holds, said monies subject to said attachment.

5. Plaintiff desires to use said funds on deposit with said bank to comply with the provisions of paragraph 2 of said interlocutory decree and order of August 8, 1955. It will be in the interests of equity and justice, and without prejudice to the rights of defendants under said attachment, to permit plaintiff to do so.

6. The Court being fully advised in the premises and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. The Bank of America NT&SA, Arcata Branch, Arcata, California, is hereby ordered and directed to deposit with the Clerk of this Court the sum of \$21,528.30, being the amount on deposit with said bank for the account of plaintiff subject to the writ of attachment issued herein to defendants and cross-complainants. Said deposit may be made by said bank by depositing with the Clerk of this

Court the check of said bank payable to the Clerk of this Court for said amount. On the deposit of said check as aforesaid said bank shall be forever released and discharged of and from any and all further liability or obligation to plaintiff or defendants on account of said deposit or said writ of attachment. The Clerk of this Court shall hold said monies subject to the further order of this Court.

2. Paragraph 2 of the interlocutory decree made and entered herein on March 8, 1955, and the order fixing defendants' damage made and entered herein on August 8, 1955, are each hereby modified and amended to provide that plaintiff may comply therewith by causing the deposit with the Clerk of this Court of the check of Bank of America NT&SA, payable to the Clerk of this Court in the sum of \$21,528.30, as hereinabove provided, and by depositing with the Clerk of this Court a bank cashier's check or a certified check in favor of Harold L. Ward and Frederick S. Strong, Jr., attorneys in fact, for the balance of defendants' damage as fixed by said order of August 8, 1955, and the deposit of said checks as aforesaid shall be and constitute full and complete compliance by plaintiff of said interlocutory decree and order.

Dated: August 15th, 1955.

/s/ LOUIS E. GOODMAN,

Judge, United States District
Court.

[Endorsed]: Filed August 15, 1955.

In the United States District Court for the
Northern District of California, Southern Division

No. 33618

UNION BOND & TRUST COMPANY, a Corpo-
ration,

Plaintiff,

vs.

BLUE CREEK REDWOOD COMPANY, INC.;
HAROLD L. WARD, FREDERICK S.
STRONG, JR.; MARJORIE W. STRONG,
HAROLD L. WARD, Executor of the Last
Will of Virginia Palmer Ward, Deceased
(Substituted for Virginia Palmer Ward, Now
Deceased, Former Wife of Harold Lee Ward);
FREDERICK S. STRONG, 3RD; JOHN W.
STRONG, MARJORIE STRONG RUSSEL,
ROSAMOND ANNE STRONG PETERS,
VIRGINIA PALMER WARD, Daughter of
Harold Lee Ward and Virginia Palmer Ward;
ELIZABETH PALMER WARD, ANN
WARD, Now an Adult (First Appearing as a
Minor by and Through Her Guardian Virginia
Palmer Ward, Now Deceased, and Thereafter
Appearing by and Through Her Guardian Har-
old Lee Ward); FIRST DOE, SECOND
DOE, THIRD DOE, FIRST ROE COM-
PANY, a Corporation; SECOND ROE COM-
PANY, a Corporation, and THIRD ROE
COMPANY, a Corporation,

Defendants,

HAROLD L. WARD, FREDERICK S. STRONG, JR.; MARJORIE W. STRONG, HAROLD L. WARD, Executor of the Last Will of Virginia Palmer Ward, Deceased (Substituted for Virginia Palmer Ward, Now Deceased, Former Wife of Harold Lee Ward); FREDERICK S. STRONG, 3RD; JOHN W. STRONG, MARJORIE STRONG RUSSEL, ROSAMOND ANNE STRONG PETERS, VIRGINIA PALMER WARD, Daughter of Harold Lee Ward and Virginia Palmer Ward; ELIZABETH PALMER WARD and ANN WARD, Now an Adult (First Appearing as a Minor by and Through Her Guardian Virginia Palmer Ward, Now Deceased, and Thereafter Appearing by and Through Her Guardian Harold Lee Ward),

Cross-Complainants,

vs.

UNION BOND & TRUST COMPANY, a Corporation; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, BLACK COMPANY, a Corporation, and WHITE COMPANY, an Association,

Cross-Defendants.

FINDINGS, CONCLUSIONS, JUDGMENT AND DECREE

This cause having come on duly and regularly for trial before the Court sitting without a jury, the parties having appeared herein by and through

their respective counsel, and the Court, having heard the testimony and examined the proofs offered by the respective parties, being fully advised in the premises, and having made and entered herein its findings of fact and conclusions of law and interlocutory decree on March 8, 1955, the Court here adopts in full said findings of fact and conclusions of law; and the cause having come on duly and regularly for further hearing, evidence both oral and documentary having been introduced, the Court having considered the same, being fully advised in the premises, and having made and entered herein on August 8, 1955, its opinion and order fixing defendants' damage pursuant to paragraph 2 of said interlocutory decree, the Court here adopts said opinion and order as its findings of fact and conclusions of law on the issues therein presented; and the Court having made and entered herein on August 15, 1955, its order modifying and amending paragraph 2 of said interlocutory decree and said order of August 8, 1955, the Court finds that plaintiff has performed and complied with, in all respects, all of the terms, provisions and conditions of said interlocutory decree and said order of August 8, 1955, as amended, on its part to be performed; that plaintiff has deposited with the Clerk of this Court the sum of \$164,140.03; that said sum is the full unpaid purchase price for the property described in the contract of purchase attached to the complaint on file herein; that plaintiff has deposited with the Clerk of this Court the sum of \$35,514.85, which sum is the full damages suffered

and sustained by defendants as the result of plaintiff's defaults under said contract of purchase; that each of said deposits were made within the time and in the manner set forth in said interlocutory decree and said order of August 8, 1955, as amended, and in all respects in accordance with all of the terms, provisions and conditions thereof; that said sums so deposited are now held by the Clerk of this Court for the use and benefit of defendants; that plaintiff has performed in full all of the terms, covenants and conditions of said contract of purchase on its part to be performed; that said agreement was, and is, in all respects fair and equitable; and the Court concludes that defendants and cross-complainants are not entitled to any relief as prayed in their cross-complaint on file herein and defendants and cross-complainants are not entitled to any injunction against plaintiff and cross-defendant; that plaintiff is the owner of said property and entitled to a conveyance of the legal title thereto; that neither the defendants nor any of them, have any right, title or interest in or to said property or any part thereof, and hold the legal title thereto for the use and benefit of, and as trustees for plaintiff: that defendants are entitled to receive for their own account all of the monies heretofore deposited with the Clerk of this Court by plaintiff, being the sum of \$164,140.03 as and for payment in full of the purchase price of all of said property and the sum of \$35,514.85 as and for damages suffered by defendants; and that no defendant or cross-complain-

ant shall recover from plaintiff and cross-defendant herein any further monies or expenses or damages or costs of suit herein incurred; now, therefore, the Court being fully advised and good cause appearing therefor and by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. Plaintiff is the owner and entitled to the possession of all that certain real property situated in the County of Humboldt, State of California, more particularly described as follows:

The following lands in Township Eleven North (11N), Range Two East (2E), Humboldt Meridian:

The Southwest Quarter of the Southwest Quarter of Section Two (SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 2);

The East Half and the Northeast Quarter of the Northwest Quarter of Fractional Section Three (E $\frac{1}{2}$ and NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Frac. Sec. 3);

The Northwest Quarter of Section Eleven (NW $\frac{1}{4}$ Sec. 11);

The following lands in Township Twelve North (12N), Range Two East (2E), Humboldt Meridian;

The Southwest Quarter of Fractional Section Eighteen (SW $\frac{1}{4}$ Frac. Sec. 18);

The North Half and the Southeast Quarter of Fractional Section Nineteen (N $\frac{1}{2}$ and SE $\frac{1}{4}$ Frac. Sec. 19);

The Northeast Quarter of Section Twenty-nine (NE $\frac{1}{4}$ Sec. 29);

The entire Fractional Section Thirty (Sec. 30):

The West Half of Section Thirty-two (W $\frac{1}{2}$ Sec. 32);

The Northwest Quarter of Section Seventeen (NW $\frac{1}{4}$ Sec. 17);

The North Half of Fractional Section Eighteen (N $\frac{1}{2}$ Frac. Sec. 18).

The claims of defendants and cross-complainants, and all persons claiming by, through or under them, or any of them, in and to said real property, are and each is without any right whatever, and said defendants and cross-complainants have no right, title, interest, claim or estate whatsoever in, to, or upon said real property, or any part thereof; and defendants and cross-complainants, and all persons claiming by, through or under them, are hereby forever enjoined and debarred from claiming or asserting any estate, right, title, interest in, or claim or lien upon, said property adverse to or against the rights and privileges of plaintiff and cross-defendant, and from in any manner or in any way interfering with the use and enjoyment thereof by plaintiff and cross-defendant.

2. Defendants, and each of them, are hereby ordered and directed, within ten days from the date of service upon them of notice of the entry of this judgment (which service may be by service on their attorneys of record herein), to execute and deliver to plaintiff and cross-defendant a good and sufficient grant deed of conveyance in fee of all of said property. On the delivery of said deed to plaintiff and cross-defendant the Clerk of this Court is hereby

ordered and directed to deliver to defendants all of the monies heretofore deposited with said Clerk by plaintiff, being the sum of \$164,140.03 as and for payment in full of the purchase price for all of said property and the sum of \$35,514.85 as and for damages suffered by defendants.

3. If defendants and cross-complainants, or any of them, fail to execute and deliver the deed hereinbefore directed to be executed and delivered by them to plaintiff and cross-defendant within the time hereinbefore specified, then and in that event the Clerk of this Court is hereby authorized and directed to execute and deliver to plaintiff and cross-defendant a grant deed conveying to plaintiff the above-described property in fee. On the delivery of said deed to plaintiff and cross-defendant by said Clerk, said Clerk is ordered and directed to hold said sums heretofore deposited with said Clerk by plaintiff, being the sum of \$164,140.03 and the sum of \$35,514.85, for the use and benefit of and the account of defendants, and to deliver the same to defendants on demand.

4. Defendants and cross-complainants have and take nothing under or by reason of their cross-complaint and as to said cross-complaint plaintiff and cross-defendant do go hence without pay and with the relief hereby granted to it.

5. Other than as provided in respect of damages to defendants no costs of suit herein incurred are allowed to any party.

6. This action is hereby dismissed as to defendant Blue Creek Redwood Company, Inc.

Done in open Court this 23rd day of August, 1955.

/s/ LOUIS E. GOODMAN,
Judge, United States District
Court.

Entered in Civil Docket Aug. 24, 1955.

[Endorsed]: Filed August 23, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL AND
TO AMEND FINDINGS AND CONCLUSIONS

To Union Bond & Trust Company, and to A. B. Dunne, Dunne, Dunne & Phelps, Its Attorneys:

You and Each of You Will Please Take Notice that defendants and cross-complainants will, on the 9th day of September, 1955, at the hour of 9:30 o'clock a.m. thereof, move the above-entitled Court at the courtroom of Honorable Louis E. Goodman, United States Postoffice Building, San Francisco, California, for its order vacating and setting aside the Interlocutory Decree and Judgment heretofore rendered in the above-entitled action, and to grant a new trial of said cause upon the following grounds

materially affecting the rights of said defendants and cross-complainants:

(1) That said Interlocutory Decree and Judgment are, and each of them is, contrary to the law of the State of California.

(2) That error was committed during the course of said trial by not receiving evidence as to the benefits received by plaintiff and cross-defendants and the reasonable value of the use of said property while in its possession.

(3) That the taking of testimony in the matter mentioned in number (2) above and the ascertaining of the reasonable value of the use of said property while in the possession of said plaintiff and cross-defendant, is necessary for the proper determination of the issues involved herein.

(4) That the deposit in Court of the money held by the Bank of America, Arcata Branch, does not constitute compliance with the Interlocutory Decree, as such money was, at the time of such deposit and still is, subject to a United States tax lien.

Said motion will be made and based upon the records and files in the above-entitled action and upon the Minutes of the Court.

Said defendants and cross-complainants will also, at said time and place, move the said Court for its order amending the findings heretofore made and filed in the above-entitled matter in the following particulars:

Strike therefrom Finding number 13 and Conclusions of Law numbers 2 and 3.

Said motion will be made upon the ground that said Finding of Fact and Conclusions of Law are not supported by any evidence, and will be based upon the records and files in the above-entitled action and upon the Minutes of the Court.

Dated: This 31st day of August, 1955.

HARDIN, FLETCHER,
COOK & HAYES,

CARLETON L. RANK,

By /s/ CARLETON L. RANK.

[Endorsed]: Filed August 31, 1955.

[Title of District Court and Cause.]

ORDER RE EXHIBIT UPON HEARING ON
SETTLEMENT OF FINDINGS

Heretofore, August 23, 1955, a hearing was had before the above-entitled Court with respect to the settlement of Findings of Fact and Conclusions of Law in this cause. In error a letter of Belcher Abstract & Title Co., dated August 12, 1955, was marked as Defendants' Exhibit A in evidence upon such hearing. Since the Court did not intend to admit the document in evidence, but only to have it marked for identification, it is hereby,

Ordered that said document be by the Clerk marked Defendants' Exhibit for Identification and not in evidence.

Dated: September 12, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANTS' MOTION
FOR A NEW TRIAL AND TO AMEND
FINDINGS AND CONCLUSIONS

Ordered:

Defendants' motion for a new trial and to amend findings and conclusions filed herein August 31, 1955, is hereby denied.

Dated: September 12, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause.]

ORDER

It appearing to the Court and the Court finding that there was made and entered herein, on August 23, 1955, judgment and decree ordering and directing defendants and cross-complainants herein to execute and deliver to plaintiff and cross-defendant a good and sufficient grant deed of conveyance in fee of all of the property described in said judgment and decree, within ten days from the date of service upon defendants and cross-complainants of notice of the entry of said judgment; that notice of the entry of said judgment was served on defendants and cross-complainants, by service on their attorneys of record herein as provided in said judgment and decree, on August 24, 1955; that defendants and cross-complainants have failed to deliver to plaintiff and cross-defendant such deed of conveyance or any deed of conveyance to any of said property; that the time provided in said judgment and decree for the execution and delivery of said deed of conveyance has expired; and that the time provided for the stay of execution of said judgment and decree by the order of the Court made and entered herein on August 31, 1955, expired more than ten days prior to the making of this order; now, therefore, the Court being fully advised and good cause appearing therefore and by reason of the law and the judgment and decree aforesaid:

Carl W. Calbreath, Clerk of the above-entitled Court, is hereby ordered and directed to execute and

deliver to plaintiff and cross-defendant herein a grant deed of conveyance in fee of all of the property described in said judgment and decree, in the form attached hereto, and said grant deed when so executed and delivered shall have like effect as if executed and delivered by defendants and cross-complainants herein.

Said Carl W. Calbreath is further ordered and directed to appropriately complete the blanks appearing in said form of deed attached hereto, and to attach a copy of this Order to said deed as Exhibit "B" thereto.

Dated October 7th, 1955.

/s/ LOUIS E. GOODMAN,
Judge, United States District
Court.

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Harold L. Ward, Frederick S. Strong, Jr., Marjorie W. Strong, Harold L. Ward, Executor of the Estate of Virginia Palmer Ward, deceased; Frederick S. Strong, 3rd; John W. Strong, Marjorie Strong Russel, Rosamond Anne Strong Peters, Virginia Palmer Ward, daughter of Harold Lee Ward; Elizabeth Palmer

Ward and Ann Ward, defendants and cross-complainants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 24, 1955.

/s/ CARLETON L. RANK,

/s/ HERMAN COOK,

HARDIN, FLETCHER,

COOK & HAYES,

Attorneys for Appellants.

[Endorsed]: Filed October 12, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Defendants (other than Blue Creek Redwood Company, Inc.) and cross-complainants hereby designated the following to constitute the record on appeal in the above-entitled case:

(1) All of the original papers on file herein as specified in Rule 75(o) F.R.C.P.

(2) The reporter's transcript of all the evidence and proceedings at the trial as well as at all of the hearings that preceded and followed the trial.

(3) All of the exhibits whether received in evidence or merely marked for identification.

(4) This designation.

/s/ CARLETON L. RANK,

/s/ HERMAN COOK,

HARDIN, FLETCHER,

COOK & HAYES,

Attorneys for Defendants and
Cross-Complainants.

Affidavit of service by mail attached.

[Endorsed]: Filed October 14, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents and exhibits listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the Attorneys for the Appellants:

Excerpt from Docket Entries.

Answer and Cross-Complaint of Harold L. Ward,
et al.

Affidavit of Carleton L. Rank for Attachment.

Undertaking on Attachment.

Notice and Motion by Defendants for Injunction

Pendente Lite with affidavits of S. L. Fleckner, Harold L. Ward and Ernest Harvey.

Affidavit of A. K. Wilson.

Interrogatories by Defendants to Plaintiff.

Answer of Plaintiff to Cross-Complaint.

Answer of Plaintiff to Interrogatories.

First Amended Complaint.

Amendment to Cross-Complaint on Its Face.

Answer to First Amended Complaint.

Writ of Attachment with Return of Marshal thereto.

Opinion of Court.

Findings of Fact, Conclusions of Law and Interlocutory Decree.

Order Fixing Defendants' Damage.

Order Directing Deposit of Funds with Clerk of Court.

Objections of Defendants to Proposed Findings of Fact, Conclusions of Law and Decree.

Order Transferring and Discharging Attachment.

Notice of Levy by U. S. Treasury Department.

Findings of Fact, Conclusions of Law, Judgment and Decree.

Stay of Execution.

Notice by Defendants of Motion for New Trial and to Amend Findings and Conclusions.

Statement of Reasonable Value of Use of Property.

Order Re Exhibit Upon Hearing on Settlement of Findings.

Order Denying Motion for New Trial and to

Amend Findings of Fact and Conclusions of Law.

Letter with Release of Levy.

Order to Clerk of Court to Execute Grant Deed, with copy of deed attached.

Notice of Appeal by Harold L. Ward, et al.

Cost Bond on Appeal.

Designation of Record on Appeal.

Counter Findings of Fact and Conclusions of Law, lodged February 28, 1955, but not signed.

Findings of Fact and Conclusions of Law and Interlocutory Decree, lodged Feb. 21, 1955, but not signed.

Finding of Fact, Conclusions of Law and Judgment and Decree, lodged August 18, 1955, but not signed.

Assignment and Quit Claim Deeds.

Motion and Notice of Motion for Substitute Parties.

Order extending time to docket appeal to December 12, 1955.

Order extending time to docket appeal to January 3, 1956.

Order extending time to docket appeal to January 10, 1956.

Reporter's Transcript of Proceedings on Opposition to Motion for Preliminary Injunction Pendente Lite.

Reporter's Transcript of Proceedings on Motion to Vacate Deposition.

Reporter's Excerpt Transcript of Proceedings,

December 2, 1954.

Reporter's Transcript of Proceedings on Pre-Trial Conference and Motion to Amend Complaint, November 8, 1954.

Reporter's Transcript of Hearing on Settlement of Findings, March 3, 1955.

Reporter's Transcript of Trial Proceedings, November 22, 1954.

Reporter's Transcript of Trial Proceedings, November 23, 1954.

Reporter's Transcript of Trial Proceedings, November 24, 1954.

Reporter's Transcript of Trial Proceedings, November 26, 1954.

Reporter's Transcript of Trial Proceedings, November 29, 1954.

Reporter's Transcript of Trial Proceedings, November 30, 1954.

Reporter's Transcript of Trial Proceedings, December 1, 1954.

Reporter's Transcript on Argument, December 2, 1954.

Reporter's Transcript on Argument, December 3, 1954.

Reporter's Transcript on Motion to Discharge Writ of Attachment, April 28, 1955.

Reporter's Transcript on Motion to Discharge Attachment and on Defendants' Damages, April 28, 1955.

Reporter's Transcript on Settlement of Findings, August 23, 1955.

Reporter's Transcript on Motion for New Trial,
September 9, 1955.

Reporter's Transcript of Proceedings, October 7,
1955.

Plaintiff's Exhibits at Trial, 1, 2, 3, 4, 5, 6, 7,
8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22,
23, 24, 25, 26 and 27.

Defendants' Exhibits at Trial: A, B, D, E, F,
G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V,
W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH,
AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS
and AT.

Plaintiff's Exhibits at Hearing on Motion to Dis-
solve Attachment: 1.

Defendants' Exhibits at Hearing on Motion to
Dissolve Attachment: A, B, C, D and E.

Defendants' Exhibits at Hearing on Settlement
of Findings, August 23, 1955: A.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
10th day of January, 1956.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

The United States District Court, Northern District
of California, Southern Division

No. 33618

Before: Hon. Louis E. Goodman, Judge.

UNION BOND & TRUST COMPANY, a Corpo-
ration,

Plaintiff,

vs.

BLUE CREEK REDWOOD COMPANY, et al.,
Defendants.

REPORTER'S TRANSCRIPT PROCEEDINGS

Monday, November 22, 1954

Appearances:

For Plaintiff:

DUNNE, DUNNE & PHELPS,

Attorneys at Law, By

LOUIS L. PHELPS, ESQ., and

EDWIN V. MILLS, JR., ESQ.

For Defendants:

HARDIN, FLETCHER, COOK and
HAYES,

Attorneys at Law;

CARLETON L. RANK, ESQ., and

LAWRENCE S. FLETCHER, ESQ.

HAROLD L. WARD

was called as a witness on behalf of the plaintiff as an adverse witness under Rule 43(b) of the Federal Rules of Civil Procedure, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Harold L. Ward.

Direct Examination

By Mr. Phelps:

Q. Mr. Ward, your residence is Orchard Lake, Michigan? A. Yes.

Q. And you are the defendant and cross-complainant in this action? A. Yes.

Q. Just very quickly to identify them—and I am leading you on this—During the existence of Blue Creek Redwood Company, you were the President and principal managing officer of the Blue Creek Redwood Company? A. Yes.

Q. And were such in 1946? A. Yes.

Q. And as such handled the negotiations on behalf of Blue Creek Redwood Company for the sale to A. K. Wilson of what is known as the Ward lands here indicated in green on this map? [53*]

A. Yes.

Q. Can you just identify very quickly on this map—perhaps the map should be marked by the Clerk as Plaintiff's Exhibit first in order.

The Court: Any objection?

Mr. Rank: No, except with the understanding

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Harold L. Ward.)

that it is not accurate as to where the Klamath River is.

Mr. Phelps: Yes. It is for purposes of general illustration, so we can all see what we are pointing to.

Mr. Rank: With that understanding.

The Court: Admitted as Plaintiff's Exhibit No. 1 for Illustrative purposes and subject to correction.

Mr. Phelps: Yes.

(Whereupon, map referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Phelps): Does the green area indicate generally the area sold under this contract?

A. Yes.

Q. You refer to it in correspondence and otherwise as the "Little Ward Contract" from time to time?

A. I can't remember that that term was used, no.

Q. At any rate, that is the land covered by this agreement of May 1st, 1946? A. Yes. [54]

Q. At that time, when you executed that contract, Mr. Carlton Rank here represented you as attorney for Blue Creek Redwood Company, is that correct? A. Yes.

Q. And as such prepared the agreement on your behalf?

A. Yes, with Mr. Rank and Mr. Lawrence Fletcher.

(Testimony of Harold L. Ward.)

Q. Mr. Lawrence Fletcher of the law firm at that time of Fletcher, Rank, Hardin—what was it? At any rate, the Fletcher firm, and Mr. Fletcher and Mr. Rank both represented you at that time?

A. Yes.

Q. Mr. Wilson was not represented by any attorney during those negotiations or the execution of the contract, is that so?

A. I understood from Mr. Wilson at the time, while he was just talking there, he was going to submit it to his attorneys in Portland for okay. He introduced them to me once.

Q. Pardon me?

A. I said he had previously introduced them to me once, and I understood he was having them review that matter for him.

Q. That would be hearsay on your part. At any rate, this is fair to say: During none of the negotiations were there any conferences with any attorneys representing Mr. Wilson, isn't that true?

A. No, not as between us. [55]

Q. During 1953 did you know that the Wilson interests were logging on both the Ward and the Sage lands?

A. Yes. That is, I had supposed they were.

Q. Didn't you have such information?

A. Yes.

Q. I beg your pardon? A. Yes.

Q. Did you hire anybody to go into the woods and check on the logging operations to see that logs

(Testimony of Harold L. Ward.)

were properly branded and to see what logs were being removed, both from Ward and Sage?

A. Yes.

Q. Who was that? A. Well, Mr. French.

Q. Mr. W. W. French? A. Yes.

Q. When did you so hire him, do you remember?

A. Let's see. Mr. Lawrence Fletcher made the initial arrangement with him, I think, beginning back in late August of 1952. I was trying to get the thing set up so it would require as little of my personal attention as possible, so Mr. Lawrence Fletcher was the one who was in immediate contact out here in California. I was back in Michigan and several thousand miles away, and it was not convenient for me personally to follow all the details. [56]

Q. Is this fair to say, though, that because of your residence in Orchard Lake, you had Mr. Lawrence Fletcher to more or less look after the administration of these lands for you? Is that right?

A. Yes, to follow it up as much as I could out here. [56-A]

Q. You designated Mr. Fletcher as a person to receive copies of all reports relating to this land, didn't you? A. Yes.

Q. You designated him as a person to receive copies of letters of transmittal of checks, payments and notices of any kind?

A. The checks were all sent directly to us at Orchard Lake.

Q. My question was about copies. Did you direct

(Testimony of Harold L. Ward.)

copies of all letters of transmittal be referred to him?

A. Are you speaking of directing Mr. Wilson?

Q. Yes.

A. Well, I don't know that we had any express direction. Sort of grown in the habit of Mr. Wilson keeping Hardin, Rank, Melsor and Fletcher informed, and in turn I would send copies of things to Dunne and Dunne and keep them informed.

Q. Isn't that true that sometime in January, 1953, you asked Mr. French to submit weekly reports to you and check weekly as to the amount of timber being taken off the Ward and Sage lands, isn't that right?

A. No, I wrote him a letter in the latter part of January. What we were employing him for primarily was to check on the waste factor. It had been reported to us some time previously that there was a great deal of waste going on in the logging and we were employing Mr. French for two purposes: one was to distinguish, make sure that the logs were properly marked and branded as between ourselves and Arrow Mill and California [57] Barrel, and the other was to try and limit the waste as much as possible by persuasive methods, if it could be, and see that the timber was felled with the least breakage and such as that. Those were the primary duties that he had there.

Q. Mr. Ward, what I want to know is—you recall your deposition—I just want to recall one thing to you and ask you is it still your position that the

(Testimony of Harold L. Ward.)

idea of checking the number of logs coming out of the woods, the board feet, was completely Mr. Harvey's idea or Mr. Fleckner, or Mr. Fletcher's idea as distinguished from yours?

A. Well, in the letter I wrote late in January I asked him if he could send me a report weekly of what landings were being operated, to give me an idea of the area covered by those landings, and how much was coming out each week from those landings. What I was after there was to try to get a comparison of the recovery against the cruise of the timber and get some idea, by comparing the timber that was coming out with the cruise, as to how much Wilson was actually recovering on the cruise and I was trying to get data together for that purpose.

Q. Is this the letter to which you refer of the 27th——

Mr. Rank: There is one before that of the 26th. Do you have the letter of the 26th?

Mr. Phelps: You find it for me and I will present it to him, if you wish. [58]

Q. I will show you that letter and ask you if you can identify that as a copy of a letter you sent to Mr. French, dated January 27th, 1953?

A. Yes, yes, that is right.

Q. In that letter you addressed to Mr. French, you said, "Could you have Mr. Fleckner make a check once a week of Wilson's superintendent as to what landings they are operating at, and at least

(Testimony of Harold L. Ward.)

a rough estimate of how many thousands of feet of each species of logs has been removed during the week, and send us a report?" A. Yes.

Q. You sent that? A. Yes.

Q. "We think it is important to keep up to date on what is happening in the operation. With kind personal regards, Yours very truly, Harold L. Ward."

A. Yes. You see. If we got reports from the landings sufficiently so they would correspond to a geographical unit of the cruise, then we could get some idea of how he was doing with respect to the cruise in checking it off.

Q. Mr. Ward, you did send a letter?

A. Yes.

Mr. Phelps: We will ask that that letter be admitted as plaintiff's exhibit next in order.

(The letter referred to was thereupon received [59] in evidence and marked Plaintiff's Exhibit No. 2.)

Q. (By Mr. Phelps): As a result of that request you did thereafter receive reports from Mr. French monthly, didn't you?

A. No, I believe those reports, if you are referring to the Harvey reports, that is something they organized on their own. It was information that I understood from Mr. French that they were getting for California Barrel & Arrow Mill anyway, and so they sent us a copy along, too. But I don't think that came as a result of my letter there.

(Testimony of Harold L. Ward.)

It was not just the sort of thing I was looking for in my letter.

Q. You did receive reports, however, monthly from French's office giving you the amount that was being removed from Ward land or Sage land or Ward and Sage, as the case may be, from each landing, didn't you?

A. They began sending us those reports—well, the first one was for the month of May. I wonder if there is a cup of water. My mouth is all dried up.

(Water procured.)

Q. So then you did receive these reports from Mr. French and you received them month by month in 1953?

A. Yes. I sent these so-called Harvey reports that we have been referring to them.

Q. Mr. Ward, I do not want for a moment to cut you off if you have anything to say, but I am going to try to speed it along. And if at any time I cut you off you say so, and I will let [60] you go on. But referring back to the report that you first received, you said in April—was the year 1953, sir?

Mr. Rank: I do not think he understood that question.

The Court: He said he commenced receiving reports in April. He did not say what year.

Mr. Phelps: I am just trying to establish the year.

Q. That was 1953, wasn't it?

A. Well, the particular report that you are re-

(Testimony of Harold L. Ward.)

ferring to, I believe—can we identify the reports that you are referring to in some way?

Q. I was hoping those reports would be here. As a matter of fact, I know where they are. They are undoubtedly in the Clerk's office upstairs, and I intended during the 11 o'clock recess to check on it. You proceeded without a recess and so here we are. I have a photostatic copy but I can't identify it for the record. I can certainly describe for you what we are talking about.

Mr. Rank: Are you talking about the monthly reports that came in, Mr. Phelps?

The Witness: They started coming in, the first one, for the month of May? The first one was for the month of May, 1953.

Q. (By Mr. Phelps): This is the type of report I am referring to, so it will be clear, a form of report which is entitled "The scale of Ward and Sage, Wilson contracts." A. Yes. [61]

Q. You commenced receiving that type of report in April, 1953, and continued on through the calendar year 1953 and into 1954?

A. No, I received the first one in June.

Q. Covering the month of April?

A. Covering the month of May.

Q. And then you received them monthly from the month of June to October, inclusive, 1953. Did you in the ordinary course receive monthly such reports covering the logs removed during those five months in 1953?

A. We received those particular reports, yes.

(Testimony of Harold L. Ward.)

Q. You received those in Orchard Lake, Michigan?

A. At Orchard Lake, Michigan, yes.

Q. In addition to that a copy of it was sent to Mr. Fletcher in Oakland, is that not so?

A. I believe so.

Q. The type of information shown on there was quite detailed, was it not? A. Yes.

Q. And shows the pole number, the second number, the equipment, the contractor, whether it was from Ward or Sage land, as the case might be, and then there is a third classification showing it was Ward and Sage jointly, a third classification. There was a third classification known as the Ward and Sage where they were jointly grouped together. [62]

A. Are you speaking now of the timber removed?

Q. In the report.

The Court: Show it to him.

Mr. Phelps: I am trying to identify it at the moment. We will get it from the witness who made it. I am trying to speed it up. Put your glasses on. "Weekly report"—and I just happened to use this one for August, 1953, as an example.

Q. You have a classification column entitled "Timber of Ward." The first week it is "Timber and land" and the first week is "Ward, Sage, Sage, Sage, Ward, Ward, Ward." A. Yes.

Q. That means it came from the Ward lands in cases and Sage lands? A. That is right.

Q. It is your understanding that where the initials "W-S" appear, that that meant it was from

(Testimony of Harold L. Ward.)

the Ward or Sage, as the case might be, lumped together?

A. Yes, or Ward and Sage both, that is right. [63]

Q. You read and understood what that meant when you received it?

A. You mean as to which land they came from?

Q. Yes.

A. Yes, some were Ward lands, some were Sage, and some was a mingling of the two, that is right.

Q. In addition to that it indicated who it was logged for, didn't it? Look at this column, "Logged For."

A. Yes.

Q. It would indicate "Creditors." You knew that was Coast Redwood Company, didn't you?

A. No, I did not. I did not understand what that column meant actually. I did not know this difficulty between Wilson and the creditors, or that the creditors had any part in it.

Q. Didn't you receive not only information, but a detailed report from Mr. Harvey giving the exact order of the bankruptcy court down there approving the contract which was in Mr. Harvey's file?

A. I inquired about this creditors business and then I was told that some of the logs up there were being—that the money was being paid over to them for some of those logs, yes.

Q. And you knew that was for Coast Redwood Company?

A. I didn't know just the relationship of his

(Testimony of Harold L. Ward.)

legal troubles there with the creditors. I did not know what the situation [64] was.

Q. When did you first receive any information that Union Bond and Trust Company was doing any logging on its account or behalf?

A. On its own account? Well, let me see. The first time that I understood that that was the case, was along in March there, when I was talking with Mr. Fletcher on the telephone.

Q. March of what year? A. 1953.

Q. You mean 1953 or 1954? I think you are mistaken in your calendar year, but I do not want to presume so.

A. Yes, that is 1954, that is right.

Q. So in 1954, is that your testimony, that up until that time you did not know that Union Bond and Trust Company was doing any logging for its own account, is that right?

A. That is right.

Q. And yet you received these reports, these monthly reports, an example of which you have in front of you right now?

A. Yes. As I testified in my deposition there, I looked at the first one of these that was sent. It has all this miscellaneous information about the machinery they are using. It names the landings and so on. But here when it shows—it wasn't the sort of information that I was after. It did not help us. It was nothing that I could take and compare with our cruise and get any comparison at all, and when it broke up [65] quantities as between Ward

(Testimony of Harold L. Ward.)

and Sage, and then have another category with Ward and Sage thrown together, it just struck me as being useless for our purposes, so I just had them filed and told my secretary that the next time I was out West, to give me that file, I would take them along and see if a report could be gotten together that was of more use to us.

Q. I have not asked you for that explanation yet. My question is with respect to Union Bond and Trust Company. No question about it, the report that you received monthly showed the number of logs being removed by the Union Bond and Trust Company, didn't it, for example, in August——

Mr. Rank: Just a moment. We object to that as being argumentative and assuming something not in evidence. The report does not show it was logged by Union Bond and Trust Company. That is the confusing part of the report in that regard. It says, "Logged for."

The Court: "Logged for," I read.

Mr. Rank: Logged for Union Bond and Trust Company or logged creditor's committee. It does not say who was doing the logging.

Q. (By Mr. Phelps): Then let me ask you this: Did you note before you had your secretary file these things, that commencing sometime in June through August and through October, that Union Bond and Trust Company—that they were logging for Union Bond and Trust Company? Did you note that? [66]

(Testimony of Harold L. Ward.)

A. Logging for Union Bond and Trust Company?

Q. Yes.

A. Well, I saw that column first on this June report.

The Court: You asked him a question that clearly calls for the contents of the document, and then he gives a long explanation of it.

Mr. Phelps: All I am asking him is if he noted that particular item.

The Court: It is in the report, and he says he got the report. What more?

Mr. Phelps: The only reason I did it, his explanation is that he says he simply had them filed; he did not pay too much attention. I want to establish the time. But I will pass it.

Q. (By Mr. Phelps): How long after you first started receiving these reports did you discontinue examining these reports?

A. I first saw the one in June——

Q. The one in June, can you identify as for a particular month?

A. For the month of May—yes, the one received in June for the month of May. Then I was away from home from the end of June until the middle of September, a little after. I got back about the 20th of September, and after I got back I took the file out and glanced at them then with the same result. At that time, we had the July and the August and September reports for the months of June, July and August, respectively. I glanced [67] at them

(Testimony of Harold L. Ward.)

and had the same conclusion I had in June, that they did not really mean anything to us.

Q. The documents speak for themselves, but did you note their contents? That is all I want to know.

A. Just according to those headings.

Q. Under the headings, did you note what was there? That is all I am asking?

A. I noticed that there were figures, writing, and so forth.

The Court: Since we did not take any recess this morning, we will take the noon recess at this time. We will reconvene at 2:00 o'clock.

(Whereupon, an adjournment was taken, until the hour of 2:00 o'clock p.m., this date.)

November 22, 1954, at 2:00 P.M.

(Harold L. Ward, a witness called by the plaintiff herein, resumed the stand.)

Direct Examination

(Continued)

By Mr. Phelps:

Q. Mr. Ward, before the noon recess you had testified, if I understood you correctly, sir, that the only purpose of those reports from Fleckner and French, so far as you were concerned, was to compare the recovery with the cruise, is that right? Am I correct in that assumption?

A. Well, the purpose for which we had employed them, was to watch the waste in the operations. We

(Testimony of Harold L. Ward.)

had heard that there was a good deal of waste going on; to watch that factor, and then to be sure that the logs were correctly branded. Those were the two prime purposes, along with gathering enough information, I had in mind so I could compare the production with the cruise.

Q. You were interested in a comparison of the production with the cruise? A. Yes.

Q. By that you mean the cruise is the estimated board feet of timber that is on the land, according to the man who originally cruised it for you to determine that estimate? A. Yes.

Q. In turn the land was sold on that basis? [69]

A. No, it was not sold on that basis.

Q. All right, we will pass that for the moment. But you wanted to compare the actual recovery off the Ward lands with the original cruises?

A. Yes, with the idea that if this waste was going on, of determining how much the waste factor might be, or if there wasn't any waste going on, how much the cruise might be over or short, as the case might be.

Q. As far as that object is concerned, Mr. Ward, you would have to then determine how much was coming off the Ward land, wouldn't you?

A. You would have to assemble that data there.

Q. So that it is perfectly clear that one of the things that you wanted Mr. French to determine was what was coming off the Ward lands currently for that purpose?

A. By geographical units there, you see, by the

(Testimony of Harold L. Ward.)

landings; when you got enough of those that were contiguous, you could make a comparison with the cruise for that same area.

Q. You told us that it did not contain enough information to satisfy you, am I correct in that?

A. It was quite useless for my purpose.

Q. What additional information did you need?

A. Well, what we really needed there was a regular logging map, such as Mr. Wilson would have in his office, with the topography on it and with the outline of the land, a large-scale [70] map so you could in some way put these things together and build up that picture. But they never got the reports around to doing the sort of thing that I was really after.

Q. Mr. Ward, if the reports you were receiving from Mr. French did not contain the information you wanted did you at any time request that he obtain further information for you?

A. Well, I requested—that was the letter that you referred to here before lunch, a request along that line, but it did not result in my getting just what I wanted.

Q. The letter you are talking about is the letter of January 26th, 1953? A. Yes.

Q. After he developed that information for you did you ever at any time tell Mr. French that he was not giving you the information that you wanted?

A. No, I decided after I saw those reports that

(Testimony of Harold L. Ward.)

I would have to leave it until some time I was out west here and could go into conference with him.

Q. And yet you paid him regularly, didn't you, and rather substantial sums for that information?

A. Yes, in connection with the waste. He was reporting on the waste. Also he was endeavoring to get, where logging practices were of a wasteful kind, he was endeavoring to get those corrected by pointing them out to Mr. Wilson's superintendent, and so on, and he was watching the branding [71] of the logs, right along, to keep those separate for Arrow Mill and the California Barrel Company and ourselves.

Mr. Phelps: Over the noon hour, your Honor, we had the exhibits in the Fleckner deposition.

Q. I show you a bound volume for the year 1953 and I ask you if that does not contain the reports for the calendar year 1953 for Mr. French reporting to you the general remarks and the policing of the log distribution of the Ward lands?

Mr. Rank: You might explain to him that that is a copy that Mr. Fleckner kept.

Mr. Phelps: Yes, that is Mr. Fleckner's copy that he kept, and bound in that form.

The Witness: Yes, we were getting reports like this.

Q. (By Mr. Phelps): By "like this" you are referring to the typewritten pages and the general remarks. You were getting such reports? You received this copy. The next thing you turn to is a copy of the order authorizing and permitting the

(Testimony of Harold L. Ward.)

debtor in possession, in an agreement with the Union Bond & Trust Company, approving the agreement in the Coast Redwood matter under the creditors.

A. I didn't assume that that was anything that concerned us at all.

Q. But you received a copy of it, didn't you?

A. I couldn't say for sure whether we did or not. If he said it to us we undoubtedly did. I did not consider that we [72] were concerned with this.

Q. We will come to the details of it in a moment, sir, but just generally the information contained here—and we will take, for example, first of all the scale reports, such as has been shown to you, a photostatic copy—that information you got a copy of, didn't you, entitled "Sage, Ward and Wilson contract"?

A. Yes, this type of report he just started sending us in June for the month of May. That was the first one.

Q. That is your information. The record shows it started for the month of April.

A. We were getting things like this. There wasn't anything like that.

Q. That is what I am coming to. The second type of report that you got was what you just referred to as reports like this, and it shows "report of Ernest Harvey's activities day by day." You were getting copies of that, weren't you?

A. Yes, I imagine we were getting those.

Q. And those reports of Ernest Harvey's ac-

(Testimony of Harold L. Ward.)

tivities day by day included and went through the calendar year 1953, didn't they?

A. Yes, I think they went right through.

Q. You received those at Orchard Lake, Michigan?

A. Yes.

Q. Were those also meaningless to you? [73]

A. Very largely so, yes. The benefit that we attached to having him there was he was getting the logs properly branded and also that where there were waste factors, that he was calling them to the attention of Mr. Wilson's superintendent. But so far as anything for my purposes, office purposes, there wasn't much I could do with a report of that kind. You see, that report just shows so many loads of logs were taken off, and it doesn't mean anything.

Q. But you read them and attempted to find out what they meant?

A. I glanced at them. That is as far as I could go.

Q. You knew that was a report being sent to you weekly of the daily activities of Mr. Ernest Harvey on your behalf in that land?

A. Yes, I was satisfied he was on the job, looking out for our interest, seeing that the logs were branded right and trying to get the waste in the operation cut down.

Q. And you say you did not know that Union Bond & Trust Company was doing any logging or any logging was being done for it prior to March of this year, 1954?

A. In 1954, that is the first time I realized that

(Testimony of Harold L. Ward.)

Union Bond & Trust Company itself was actually doing any logging.

Q. You did receive, though, these Ernest Harvey daily diaries during the month of June, 1953, didn't you?

A. During the month of June, 1953? [74]

Q. Yes. A. Yes, I did.

Q. So that you did then receive this one from Mr. Harvey dated June 3rd, 1953: "A new contractor, L. Calvin, has moved in to the west half of Section 32 on Ward timber. He started building a road there today going north off the California Barrel road 200. This side is to be operated by the Union Bond & Trust Co. Road and landings will be No. 3-232 series."

You recall that? A. I presume so.

Q. Is there anything uncertain about that in your mind or meaningless as to the language used and chosen in that respect?

A. No, the language seems perfectly clear.

Q. You knew then from that in June of 1953 that Union Bond & Trust Company was logging on its own account?

A. No, I did not. I did not read the reports that carefully. I did not read all those items. As I say, those reports were pretty nearly useless for my purposes and I did not go into them in detail that way.

Q. The reports would tell you from day to day whenever any equipment broke down, what was

(Testimony of Harold L. Ward.)

being used, what the loaders were, where the operation was daily, who the truckers are, the amount that was being paid the contractors—they told you enough information so that a person in your position as a landowner [75] would be able to tell exactly what was going on, isn't that true?

A. No, I am not concerned with what equipment was being used or who the truckers are. It is the net results of the operation that we are concerned with there, but the means by which it is being logged, this trucker or that trucker, or what machinery, that would not be a matter for us to be concerned with.

The Court: Harvey was the agent?

Mr. Phelps: Harvey was the agent of the Wards.

Q. That is true, is it not?

Mr. Rank: Harvey was an employee of French, French was the man who was employed by the Wards. Harvey worked for him. He was employed by the Wards along with other people.

Mr. Phelps: To be perfectly clear, sir——

The Court: I do not see why you labor that point. What difference does it make whether Mr. Ward——

Mr. Phelps: He is charged with knowledge.

The Court: He was the agent. I mean for what that is worth.

Mr. Phelps: I understand, your Honor.

Q. It was from the information contained in these scale reports which were in your possession

(Testimony of Harold L. Ward.)

currently as they were made out and sent to you that you ultimately devised the information showing that there had been some discrepancy in the reporting of logs, is that not true? [76]

A. Mr. Lawrence Fletcher observed for the month of October——

Q. Was it from this information? That is all I want to know.

A. Yes, he observed it from that information—not currently though, because Mr. Wilson's reports came in so late that it could not be done currently.

Q. I am just trying to make the record clear. I want to understand you, sir. It was, however, from this information which is being furnished to you through French that the figures were developed showing some \$35,000 that had not been paid for, is that not true?

A. Could you put that question again? What was that question? [77]

Q. My question is this, sir. I will reframe it to you. The information contained in these monthly reports was the information which you used to determine that there was a discrepancy between the logs reported and paid for and the logs removed?

A. Well, it was the information in the October report that called Mr. Fletcher's attention.

Q. Let us go back a step beyond that. And then after the October report, you used the reports for the months of September, August, June and July to determine the same information, isn't that true?

(Testimony of Harold L. Ward.)

A. Most of the other reports you couldn't have told that information. They would not have revealed that.

Q. In what way were they different, will you show me?

A. Because the category of the Sage-Ward—you see, there are three columns in those reports: One for Ward timber, taken off, one for Sage timber taken off, and one for Sage-Ward, Sage and Ward timber taken off, or Sage or Ward, and in most of those months the amount of the timber in that Sage or Ward column was of sufficient quantity so that you could not tell anything about the total, because you did not know whether that was 90 per cent Sage and 10 per cent Ward or the other way around, fifty-fifty, or what.

Q. But in each instance, Mr. Ward, if you had compared that which was in the Ward column alone, which was clearly Ward, it [78] was always more than was paid for by Coast, isn't that true, during those five months?

A. I don't know. I didn't pay any attention to that. It seemed to me it was clear. You couldn't make anything from it.

Q. Mr. Ward, in arriving at the price of the original contract you used, in the sale of this land originally in May 1946, you used the Percy-French cruise?

A. No, we did not.

Q. What cruise did you use?

A. We didn't use any cruise.

(Testimony of Harold L. Ward.)

Q. On a stumpage basis, did you have any figures?

A. No, we did not discuss that at all.

Q. Is this true, that on the Percy French cruise the price divided into the French cruise works out to \$3.82 a thousand? Is that approximately correct?

A. My figure would be, if you worked it out that way, \$3.88.

Q. All right; \$3.88. Isn't it true that when you came to fix the value or the price to be paid for this stumpage as it was removed, that a higher price of \$5.00 as a margin of safety. Security to you, isn't that true?

A. Well, the price of \$5.00 was what Mr. Wilson was paying to the Ward Redwood Company on the stumpage removed, and we both simply agreed that that would be the same \$5.00 used here.

Q. I do not want to belabor the point, but aren't the words "margin of safety" and "additional security" your own words? [79]

A. We felt that in order to guard against timber wastage to some extent that we should be paid something more than what it would average out from the price, yes.

Q. And the purpose of having the \$65,000 payment to you in advance, before anything was removed, was to give you a further margin of security, isn't that true?

A. Well, to insure, yes, that our timber would not disappear without being paid for.

Q. I'll go back a moment. With respect to the

(Testimony of Harold L. Ward.)

time that Union commenced logging, I want to ask you if you received a copy of this letter dated July 27th, 1953, addressed to Mr. Fletcher by Mr. French. Did you receive a copy of that?

A. It says so here.

Q. Do you have any recollection of having received that letter? I wanted to call your attention to the first paragraph?

A. So far I do not recognize anything. I have not read it all yet, but I do not actually recall it.

Q. Let me ask you if this refreshes your recollection, that on July 27th, you were advised of these facts as stated in this first paragraph:

“Dear Mr. Fletcher:

“This will acknowledge your letter dated July 21st. I am at this time personally checking all the Union Bond and Trust Co. and the Coast Redwood Company [80] activity concerning the Ward, Sage, California and Arrow Mill interests.

“Signed by Mr. French.”

And do you remember receiving that? Does that refresh your recollection as to your personal knowledge? A. No.

Q. Mr. Ward, when was the first time that you personally had knowledge of this discrepancy, then?

A. Well, let's see. Mr. Fletcher I think mentioned it——

Mr. Rank: Just a moment, Mr. Ward.

We want to be careful, if your Honor please, concerning privileged communications. I think the question is as to the date.

(Testimony of Harold L. Ward.)

The Court (to the witness): It is better just to answer questions. Generally speaking, lawyers take care of their clients, and in course of a trial when a client tries to take care of himself, he does not usually do as well. All he asked you was the date.

Q. (By Mr. Phelps): When you first acquired personal knowledge of the discrepancy?

A. Well, the possibility of a discrepancy around the end of January.

Q. The end of January, 1954? A. Yes.

Q. At that time you instructed—I tread on ground that I [81] will try to avoid at the moment—at that time Mr. Fletcher was acting for you and on your behalf in taking general supervision of the way this contract was being handled?

A. Yes.

Q. He was supervising the activities on your behalf with Mr. French? A. Yes.

Q. He was receiving copies of all the reports that Mr. French was sending and making in the ordinary course of his business? A. Yes.

Q. On that occasion did you not instruct Mr. Fletcher to write Mr. French to determine what this discrepancy was all about?

A. No, I did not give him any instructions. I——

Q. He did it on his own?

A. Yes. I thought there was some little thing that would be cleared up as they compared notes.

Q. Then when did you first receive a report—just the time now, please—when did you first re-

(Testimony of Harold L. Ward.)

ceive a report confirming that there was this discrepancy?

A. Early in March in a telephone conversation that I had with Mr. Fletcher from Boston. He convinced me that, after all, there might really be something to it.

Q. You try to follow the Judge's suggestion, and we will move a little more quickly, I hope. The question again was [82] as to the time? You say early in March? Can you fix it more accurately? If you can, please do so?

A. Around the 8th or 9th of March, I would think.

Q. On that occasion, and after that time in March, at least in your own mind, you were convinced that there was something to this discrepancy, is that right? A. Yes, yes.

Q. After that, did you then notify Mr. Wilson or Union Bond and Trust Company that there was this discrepancy and ask for an explanation?

A. No, I did not then.

Q. After that time did you accept further payments under this contract?

A. I don't just remember when the last payment came in relative to that.

Q. After the contract, did you communicate with Mr. Wilson with respect to other defaults and not mention these discrepancies? Did that happen?

A. You said after this contract. What do you mean?

Q. After your personal knowledge of March 8th

(Testimony of Harold L. Ward.)

or 9th, after that time, after March 8th or 9th, 1954.

My other question, in case you did not understand, I will repeat. After March 8th or 9th, 1954, did you accept any payments on that contract?

A. The record will show. [83]

Mr. Rank: We will stipulate that the payment for December, I believe, came in in the latter part of March.

Mr. Phelps: And was accepted after March 8th. That is fine.

Mr. Rank: Well, it was accepted, and the correspondence will explain that, Mr. Phelps.

Mr. Phelps: The stipulation then is only as it is in the correspondence?

Mr. Rank: Yes.

Mr. Phelps: What is the next thing that you as one of the owners did?

A. The whole question was still a doubtful question. I mean was there a shortage or wasn't there?

Mr. Phelps: I do not want to stop you one minute, and I want you to explain any answer, but it might be helpful——

The Court: Then don't you ask him a question, "What was the next thing done?" Because that opens the floodgates. Just ask him specific questions. If it is correspondence, Mr. Phelps, I suggest that you put it in without asking this witness about it.

Mr. Phelps: It is not correspondence. That is

(Testimony of Harold L. Ward.)

the point. It is exactly the way I expressed it. Something happened.

Q. (By Mr. Phelps): Did you have a conference? Was that the next thing that you did? [84]

A. Yes.

Q. You had a conference then with various other members of your family?

A. No, I had a conference with Mr. Fletcher. He came East, and he was on his way abroad and I met him in Washington on March 19th, and I had a conference with him then.

Q. Then was there a conference with your other co-owners at a later time? A. Yes.

Q. When was that? April 26th? Does that refresh your recollection? Is that right?

A. No, it was before that. I got home on March 20th and I reviewed the matter with members of my own family there during the next few days as to what we knew about it, up until that time.

Q. At that conference did you give consideration to whether or not you would advise Mr. Wilson or the Union Bond and Trust Company of this discrepancy and request that he pay?

The Court: Mr. Phelps, I do not want to interrupt your examination. I may be obtuse about this, but I do not understand what difference it makes what decision goes on in the minds of people about things like that. Either they are entitled to take a certain action under the contract by virtue of what has taken place, or they are not entitled to do it. What they talk about among themselves,

(Testimony of Harold L. Ward.)

I do not see [85] makes any difference. They may have the best reason or they may be the meanest people in the world, like old Scrooge: What difference does it make? They are either entitled to do something or they are not. I do not see your point in that regard.

Mr. Phelps: I could be mistaken, but my thought is it is most material in a case where, on the equity side of the Court, they are asking you to quiet title, and if I understand the rules of equity, you have to do equity, and one of the things you have to do is to conduct yourself in such a way as to give a person a chance to explain if there is a mistake. It makes a difference.

The Court: I understand that perfectly. There is no question about that. But I do not understand what talks among themselves have to do with the matter at all, what their motives might have been. If there is a default, and the facts speak for themselves, did they or did they not, having knowledge of that, do a certain thing or didn't they do it—that is all we are concerned with, isn't it?

Mr. Phelps: Perhaps.

The Court: I do not see what else we need worry about.

Mr. Phelps: I certainly do not want to trespass on your Honor.

The Court: I am only trying to understand the nature of the point you are trying to make and not to get into things [86] that are unnecessary.

Mr. Phelps: If it is not, of course, then I will

(Testimony of Harold L. Ward.)

leave it, but may I say this, your Honor, that I believe that the considerations that go into reaching a decision of this kind are important. Whether they discuss the question of the value of this land, whether they had in mind that they were going to get back something that was worth substantially more, more than what was due, all those things enter into this question.

The Court: The effect of it does, but I do not see what they talked about, whether they were motivated by it or not has anything to do with it. You are in default under a contract with me and I have before me, and I find out about it, and I consider whether I am going to enforce that default or not. Now, one of the things that may motivate me is whether or not I want to do business with you any further, whether or not, if I am able to enforce the default, I am going to be benefitted monetarily because of an enhancement in value of the thing. Those are all considerations that I may take into account in determining what decision I may make. But the legal effect of what I do has to be governed by what has taken place theretofore, and not then what I talked about or what I think about in my own mind.

Mr. Phelps: Your Honor may very well be right. It is not as I conceived it.

The Court: I think that is the case. You may be right. [87] And it may be if it appears under the circumstances, having learned that there is a default and considering the basis upon which a

(Testimony of Harold L. Ward.)

party must be advantaged, by taking advantage of that default, that there are considerations existing at the time that equity might take hold of and say, "This was or was not a proper decision under the rules of equity."

Now that may be so, but I think all we can consider in determining that is what has already taken place up to the time the decision is made and the default is taken advantage of and the notices are given. It is what has already taken place between the parties that determines the matter, not something that somebody has in his mind about the matter.

Mr. Phelps: Except as what a person has in his mind is expressed between himself and another and then it results in a decision, but I do not want to argue.

The Court: If you think that is important—because you know your whole case and I do not—you may proceed, but it just occurs to me you can't decide a matter according to legal or equity principles except on the basis of what has been done, what happened, what are the facts of what happened, and not what somebody thinks about it, but what actually occurred. What is the relationship between the parties? As I said, the parties may be actuated by very good motives and yet do an unconscionable thing. At the same time they may be actuated by very bad motives, and yet not do an [88] unconscionable thing.

Mr. Phelps: When they do both coming to-

(Testimony of Harold L. Ward.)

gether, then I think equity is interested. That is my point exactly.

The Court: It is what they do that counts, not their motive. I think that would be the rule of law.

Mr. Phelps: Let me do this, your Honor. Let me pass it for the moment. Let me give it some further consideration.

The Court: I pointed out what I thought about it. I am not pretending to know anything about this case yet, because all I have is the attorneys' arguments about it. If you feel that that is a factual matter that you should put in, go ahead and put it in.

Mr. Phelps: I would say to your Honor—and this may be a practical way of handling it—may I have permission to pass it for the moment, and then later if, after reviewing it further—perhaps overnight or during the development of the trial—I feel I should proceed with it, I can always press it at a later time, but I am going to follow your Honor's suggestion at the moment.

Q. (By Mr. Phelps): Mr. Ward, regardless of whether it was necessary from time to time to give default notices, and grace periods were used, the fact is, is it not, that up until that time, Mr. Wilson had always met his payments when he had been given these notices?

A. Yes, he had met the payments—up until what time have you [89] specified?

Q. Up until the time in 1953 that we are talking about.

(Testimony of Harold L. Ward.)

A. You can't include December in that.

Q. December, 1953, is the separate item, and even that was tendered to you and refused by you, the excess——

A. That was after the grace period was past.

Q. There is a technical matter on that. I won't go into that.

But other than that, with that exception, it had been true that he had always paid, even though it was necessary for him to use his grace period?

A. Substantially, yes. I think there may be an exception in respect to one of the taxes.

Q. Incidentally, with respect to taxes, you were well aware, were you not, sir, of the rights of redemption under the California Law for taxes, failure to pay taxes? A. Yes.

Q. As a matter of fact, for years prior to your sale to Mr. Wilson, you yourself had been in default on all these lands for failure to pay taxes, isn't that true?

Mr. Rank: To which we will object as being immaterial.

Mr. Phelps: It goes to show——

Mr. Rank: He had no contract obligation to pay taxes, Mr. Phelps.

Mr. Phelps: I am just showing the materiality of any [90] claimed breach——

The Court: The witness has already answered that he was aware of the rights of redemption, and so you have the answer to that.

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(Testimony of Harold L. Ward.)

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Mr. Phelps: I am just showing the materiality of any [90] claimed breach——

The Court: The witness has already answered that he was aware of the rights of redemption, and so you have the answer to that.

Q. (By Mr. Phelps): Mr. Ward, did you ever

(Testimony of Harold L. Ward.)

at any time have an understanding or an agreement with Sage Land and Lumber Company under which each to the other you would grant reciprocal or mutual rights of way across your adjoining properties in this whole general area?

Mr. Rank: To which we will object as calling for the conclusion of the witness as far as the word "understanding" is concerned. I suggest that you let the witness tell the circumstances of what happened.

Mr. Phelps: He can answer the question in that way, I suppose. I will withdraw it and start once again.

The Court: I think under the circumstances the men engaged in this business know whether or not they have an understanding. I will allow it.

Mr. Phelps: The question is understanding on agreement. I will reframe the question and limit it.

Q. (By Mr. Phelps): First, did you have an agreement? A. No.

Q. Did you have an understanding?

A. No. In my mind that is the same thing as an agreement.

Q. Did you ever have any discussions with Mr. Holter [91] representing the Sage Land and Lumber Company, looking toward such an arrangement?

A. Yes, we did have discussions to the possible desirability of arranging an exchange of rights.

Q. And you had some discussions of that nature prior to February of 1944?

(Testimony of Harold L. Ward.)

Mr. Rank: You are talking about Mr. Ward personally?

Mr. Phelps: Yes.

The Witness: Just let me get myself oriented here. Yes, I think it was prior to that.

Mr. Phelps: At that same time in 1944, sir, you were also President and acting for and on behalf of the Ward Redwood Company as well as Blue Creek Redwood Company? A. Yes.

Q. And Ward Redwood Company owned the lands immediately north of there and in the same adjacent area? A. Yes.

Q. I show you a letter dated February 29th, 1944. It is a photostatic copy. The letter is addressed to you, signed by Mr. E. L. Holter, and I ask you if you recognize that letter and if you received that from Mr. Holter?

A. Yes. Well, this is not one that was mailed to me.

Q. It is a photostatic copy?

A. On this particular copy here—I did sign such a letter, but this particular copy, that is not my signature on this [92] copy.

Q. I understand that. Did you receive the original of which this is a copy?

A. May I recite the circumstances?

Mr. Rank: You can say yes or no to that, Mr. Ward.

Q. (By Mr. Phelps): Did you receive the original of which this is a copy, first? A. Yes.

(Testimony of Harold L. Ward.)

Q. Upon receipt of it, on the original, did you sign your name in the place marked "approved," on the original, now?

A. Yes, we each had a copy.

Q. I understand that is not your signature there, but you did enter your signature on the original of the same letter? A. Yes.

Mr. Phelps: We will offer this in evidence as Plaintiff's Exhibit next in order.

Mr. Rank: To which we will object, if the Court please, insofar as these defendants are concerned, on the ground, in the first place, it does not even purport to be an agreement, and secondly, it is between Ward Redwood and Ward and Holter. In other words, that is an entirely different corporation than the corporation involved here—different lands, different stock ownership, different everything.

Mr. Phelps: Are you going to take that position?

Mr. Rank: I have just expressed my position as far as [93] that is concerned; as far as that document is concerned, yes, Mr. Phelps.

The Court: It is your contention that the agreement proposed to be executed mentioned in this letter of November 29th, 1944, was not executed?

Mr. Rank: That was signed, as Mr. Ward just testified, "Approved, Harold L. Ward."

The Court: Is it your contention that the right of way agreements referred to in this letter of

(Testimony of Harold L. Ward.)

February 29th and proposed therein to be executed were not executed?

Mr. Phelps: Never executed.

The Court: Is that the point?

Mr. Phelps: Yes, never executed.

The Court: Is that true?

A. Yes, that is true.

Mr. Rank: Of course, my objection goes to that and also the fact that that is addressed to Ward Redwood, but that refers to proposed possible agreements and they were never in fact executed.

The Court: It says, "Is agreed that Sage and Ward should execute the reciprocal right-of-way agreements," but those mutual and reciprocal right-of-way agreements between the Sage and Ward Companies were not executed?

The Witness: No, there were never any agreements.

The Court: Did you actually as between the two companies jointly make use of roads across your property?

A. No.

Q. You never did? A. No.

The Court: I think probably the objection is good, but [94] you may have that marked for identification.

Mr. Phelps: May I pursue the subject further with the witness?

(The document referred to was thereupon marked Plaintiff's Exhibit No. 3 for identification.)

(Testimony of Harold L. Ward.)

Q. (By Mr. Phelps): Mr. Ward, so far as this proposal from Mr. Holter was concerned, it was approved by you as you indicated to us?

A. Yes.

Q. And as Judge Goodman has pointed out, on behalf of the Sage and Ward companies, the Ward companies, including both Blue Creek and the Ward Redwood Company, is that not true?

A. In our mind that was not an instrument on behalf of any company but merely an expression of our personal opinions of what steps it would be desirable to take in possibly negotiating.

The Court: Mr. Ward, that is not right, is it? In discussing this matter in writing, approving this document with a representative of the other companies, you were not speaking for yourself personally, you were speaking for your interests, were you not?

A. No, I was merely speaking for myself personally.

Q. That does not make any sense to me. That is not the way business operates—not that this is of any importance to the case, but obviously you were talking about this property there and you were discussing the advisability of having some mutual [95] right-of-way agreements to assist in the operation of your respective properties. That is what you were talking about. What I was interested in inquiring of you was whether or not in fact any such documents were executed, and you said they were not? A. That is true.

(Testimony of Harold L. Ward.)

The Court: What is it you want to develop further, Mr. Phelps?

Mr. Phelps: Simply this, your Honor, that this covers by description all the lands below a certain line which includes these lands involved. It is specific enough. It shows the type of right-of-way to be granted. This writing in and of itself constitutes a sufficient written agreement as a memorandum of agreement to satisfy the statute of frauds with nothing more. That is the first thing that I propose, and the first basis of the offer of this document.

I want to go further and show, if your Honor please, and I will connect it up with other testimony from Mr. Holter—that it was his understanding that this was their understanding that they had reached.

The Court: If they had acted under it—that is why I asked the question as to whether they acted under it. If they did not act under the agreement, then I think the document would be inadmissible because it only provides for the execution of another document. [96]

Mr. Phelps: I will say this to your Honor. I want to be very candid with your Honor. We have no evidence as of the present moment that there was any written agreement after that except as the parties have always considered and treated that they were entitled to reciprocal rights of way. Mr. Holter so understood, still understands, and Mr. Ward has otherwise recognized. I will come

(Testimony of Harold L. Ward.)

to that in a moment. Maybe I had better withhold my offer for a second.

The Court: Mark it for identification.

Mr. Phelps: If you had no such arrangement or understanding, Mr. Ward, perhaps you will be good enough to explain to the Court the use of the language in the Talbott option. Do you recall the Talbott option, first? A. Yes.

Q. Under the Talbott option Blue Creek Redwood Company, of which you were then president, was proposing to give an option to one Talbott to buy certain land in that area? A. Right, yes.

Q. In that agreement that you had prepared on your behalf there was this language on page 2 of that agreement:

“Subject also to the following: A certain agreement with Sage Land & Improvement Company, a corporation, covering easements for right of way for logging purposes.”

What do you have reference to when that was inserted in that proposal? [97]

A. At the time that Talbott option was drawn was in the period when Mr. Holter and I were having conversations about possibly going into a reciprocal right-of-way agreement like that, and this was put in there as anticipatory so we would be protected in working anything like that out with Mr. Holter in the future, and Mr. Talbott could have no objection to it.

Q. When was that done? 1944? I see it is blank.

A. I think it was executed in June of 1944.

(Testimony of Harold L. Ward.)

Q. So that on behalf of Blue Creek Redwood Company you executed such an option to Talbott?

A. Yes.

Q. Containing that reference to that agreement with the Sage Land & Lumber Company?

A. Yes.

Mr. Phelps: May this be stapled together and marked as exhibit next in order?

Mr. Rank: That is all right.

The Court: That part of the agreement you read. It is limited——

Mr. Phelps: For the sole purpose and the use of the language that I quoted with respect to the reciprocal right of way.

Mr. Rank: Mr. Phelps, in order to keep this record down, do you suppose we could just introduce the page that that language appears on? [98]

The Court: I think perhaps you do not even need the document itself, Mr. Phelps, because you have covered the matter by your questions and answer and it just encumbers the record with another document.

Mr. Phelps: Perhaps that is true, except this, your Honor——

The Court: Mark it for identification and then if it becomes necessary to make up a record at a later time, you can do it by reference then.

Mr. Rank: You are marking the whole Talbott option for identification?

The Court: Mark the whole Talbott option Plaintiff's Exhibit 4 for identification.

(Testimony of Harold L. Ward.)

(The document referred to was thereupon marked Plaintiff's Exhibit No. 4 for identification.)

Mr. Phelps: Your Honor, the only reason I did that was in view of counsel's statement that Blue Creek Redwood Company had no part in such an arrangement, and here is something signed by Blue Creek Redwood Company and executed by Harold L. Ward, and also his testimony——

The Court: All right, you may argue about it a bit later in the case. Some people do not credit judges with remembering anything, but I can remember this.

Mr. Phelps: I can say so, too, not only from pleasant experiences but also from bitter experiences, your Honor. [99]

Q. In the same fashion do you recall an option agreement entered into with M. & M. Woodworking Company in which there was a similar reference? I won't bother to come to the record, but do you remember that occasion also?

A. Could you tell me the date of that?

Q. The 24th of March 1944? A. Yes.

Q. Were you familiar with the language of, and had you been furnished with a copy, first of all, of the contract between A. K. Wilson and Sage Land & Lumber Company on the land marked in yellow? A. I am sorry.

Q. Were you familiar with the general terms of that contract?

(Testimony of Harold L. Ward.)

A. A. K. Wilson Company——

Q. And Sage Land & Lumber Company.

Mr. Rank: At what date do you mean, Mr. Phelps?

Q. (By Mr. Phelps): At any time prior to this lawsuit were you familiar with it?

A. Yes, they negotiated that in May of 1945, and somewhere near that somebody told me something about it. I think it was either Mr. Wilson or Mr. Holter.

Q. My question now, sir, is did you know that in that agreement covering these precise lands adjacent to yours that Mr. Holter reserved for himself and for your benefit rights-of-way across the Ward lands and the Sage lands under that [100] reciprocal right-of-way agreement?

Mr. Rank: To which we object on the ground the document speaks for itself. I believe it is in evidence and I think you should read that.

The Court: Yes, I think that is right. If you want to ask him if he has knowledge of a certain thing, you will have to show it to him.

Mr. Phelps: I will find it but I won't take the time to search for it at this moment.

Q. Mr. Ward, at any time in your negotiations with Mr. Wilson for the sale of these Ward lands under this contract of May of 1946 did you ever represent to him that you had a mutual and reciprocal right-of-way agreement with the Sage Land & Lumber Company for each for the protection of the other?

A. No.

(Testimony of Harold L. Ward.)

Q. You never did. Did you ever discuss the problem at all? A. No.

Q. Did you at any time during the month of May, 1946, discuss with Mr. Wilson any rights-of-way problems?

A. Yes, we talked about the rights-of-way problems and they were all embodied in our contract between us and Mr. Wilson.

Q. So that the only rights-of-way there were discussed in your negotiations for the sale of that land were such rights-of-way as found themselves into the written body of the contract of May, 1946? [101] A. Yes.

Q. You never discussed the problem of rights-of-way across any of your lands either east or west of the river for the removal of any Sage lands, is that right?

A. Well, Mr. Wilson did speak of the right-of-way problem over on the east side of the river where he owned those lands up north of Blue Creek, but I told him as far as we were concerned that was something that would take a good deal of study, and we would have to leave that to another time to work the thing out together. We went into it at the time of that contract and put it in there.

Q. Did you tell him you would not grant such rights-of-way?

A. No, I didn't tell him we would grant such rights-of-way, but neither did I give him any assurance that we would. It was something to be left for the future.

(Testimony of Harold L. Ward.)

The Court: Did the timber operations commence on the Sage property about the same time that they commenced on the Ward properties?

A. You see, Mr. Wilson's timber operations commenced, not in connection with the contract that we are talking about here, but at an earlier time.

Q. That is what I am asking you. Was Wilson already operating such properties when he made the contract with you? A. Yes.

The Court: Is that right? [102]

Mr. Rank: I do not think he was operating such properties. He was operating other Ward properties. Whether he was actually working Sage I do not know, but he started operating Ward properties up in this general area.

The Court: What I am getting at is this: What roads were used to remove the timbers from such properties? How did they get to the Sage properties? Did they go through the Ward properties to get to it?

The Witness: Maybe actually he had not started to operate at all at the time of this.

The Court: That is not what I am asking.

A. At any time the two were operating, when the Sage and Ward were operating, in the Sage operations did they go over Ward roads?

A. Yes.

Mr. Rank: Sage never operated. Is that what you asked?

The Court: Didn't they cut timber on Sage?

(Testimony of Harold L. Ward.)

Mr. Rank: Wilson did, Union Bond & Trust Company did.

The Court: That is what I am talking about.

Q. Wilson cut timber on the Sage property, didn't he? A. Yes, he did.

Q. Did he take any of that timber out on roads over the Ward properties? A. Yes.

Q. Then you knew about that? [103]

A. That was under a different agreement.

Q. I do not know what agreement it was under. At any rate, timber taken from the Sage property was taken out over roads on the Ward property, was it, or wasn't it?

A. Yes, Mr. Wilson had contracts for both properties, so he took it out.

Q. Of course, his right to take the timber off the Ward property I can understand, but you were not a party to the Sage contract.

A. No, that is right.

Q. So when he removed timber from the Sage property he did take it out over the Ward roads, didn't he?

A. Yes, he bought both properties.

Q. Did you sell him the right to take timber from the Sage property out over the Ward property?

A. Where he crossed the Ward property was on the road the Government put in. [104]

The Court: It was on the Ward property?

A. Yes, sir, a short distance it was.

(Testimony of Harold L. Ward.)

Q. (By Mr. Phelps): Where? Now let's be specific.

A. Right here, for a few hundred feet.

Q. What about the Government road in here?

A. We are talking about the early time.

The Court: No, no, all I am trying to bring out is a very simple fact, and that is here was Mr. Wilson—and I am sorry to interrupt this.

Mr. Rank: That is all right.

Mr. Phelps: Let's find that out.

The Court: I would like this for my own information. Here was Mr. Wilson who had the contract with you to cut timber and who had a contract with Sage to cut timber. Of course in removing the timber that he cut under the contract with you he used the roads, whatever road there was on the Ward property?

The Witness: Yes.

The Court: Now in removing the timber from the Sage property did he use any of the roads that went over the Ward property? That is what I am trying to find out—at any time?

A. Yes. You are speaking of the property involved in this suit?

Q. I am talking about this property right here.

A. Yes, he did.

Q. Now you knew that he was doing that, obviously? [105]

A. Yes, it is all provided for in the contract with Wilson.

Q. That is something that I don't understand.

(Testimony of Harold L. Ward.)

You then did allow a right-of-way for the benefit of the operator of the Sage properties?

A. By contract between ourselves and Mr. Wilson, and not by virtue of any contract between ourselves and Sage.

The Court: Well, that is all right. That clears it up. I understand it.

Mr. Phelps: Yes.

The Court: We haven't taken a recess. Perhaps we had better take a short recess.

(Short recess.)

Q. (By Mr. Phelps): So we are perfectly clear, Mr. Ward, you have also owned some lands on the Blue Creek side of the Klamath River over in this area generally that I am indicating with the pointer?

A. Yes, that is where the Ward Redwood lands are right there where you have the pointer.

Q. I am talking about May, 1946.

A. In May, '46, that was the Ward Redwood Company.

Q. And Mr. Wilson bought some lands in there that were on the other side from Sage Land & Lumber Company, did he not?

A. They were farther up north, yes.

Q. Up in here? A. Yes. [106]

Q. And the natural outlet for the timber off those lands of the Sage Land & Lumber Company would be down through your lands, on Blue Creek, across the Klamath and up the Ah Pah Creek?

(Testimony of Harold L. Ward.)

A. That would be a natural way to do it. I have heard there is another way which somebody says is better.

Q. But it is your testimony that in all your negotiations with Mr. Wilson you never reached any agreement that you would permit him any such mutual or reciprocal rights-of-way or any right-of-way across your land for the benefit of the Sage Lands east of there? A. Yes, that's right.

Q. That is your testimony? A. Yes.

Q. I show you, sir, a letter dated May 1, 1946, and ask if you can identify that as a letter that you wrote in your own handwriting on that date?

A. Yes, that is a letter I wrote.

Q. All right. You were at the Fairmont Hotel. That was the date that the contract that is involved in this lawsuit was signed?

A. What did you say there?

Q. That letter was written on the very day you signed this contract with Mr. Wilson?

A. Yes, that's right.

Q. And it refers to that—you have just seen it—doesn't it? [107] A. Yes.

Q. It refers to a right-of-way agreement or right-of-way on the second page thereof. I will show you the whole letter in a second. That is your signature on the last or third page? A. Yes.

Mr. Phelps: All right, we will offer this in evidence as plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit 5 introduced and filed into evidence.

(Testimony of Harold L. Ward.)

(Thereupon letter referred to above was received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Phelps): All right, sir, you can follow me; follow it along at the same time. On that day you wrote as follows: "Dear Art——"

Who is Art? A. That is Mr. Wilson.

Q. A. K. Wilson? A. Yes.

Q. "Dear Art. Carlton and Lawrence——" Carlton is Mr. Carlton Rank, here? A. Yes.

Q. And Lawrence is Lawrence Fletcher?

A. Fletcher, yes.

Q. Both your attorneys. "Carlton and Lawrence are sending you the various agreements herewith as per their [108] letter accompanying. I have signed everything."

The agreement is this agreement the subject of this lawsuit; is that right?

A. Yes. Well, there were also two other agreements signed the same day that are not the subject of this lawsuit.

Q. "Lawrence and I took up with Mr. Morse of the Forest Service the question of a right-of-way for you down the Garvey Creek across the twenty——" A. "Southeast quarter."

Q. "Southeast quarter of Section 24, Township 13 North, Range 1 East, which the Government owns. Mr. Morse assures us that they will gladly arrange to give you such a right-of-way whenever you want to use it.

(Testimony of Harold L. Ward.)

“Also as to a right-of-way down Blue Creek.”

That is this right-of-way we have just been referring to? A. Yes.

Q. For the other Sage lands in here?

A. Yes.

Q. “Also as to a right-of-way down Blue Creek. We would like to get the 120 acres I mentioned near the crest of the Ridge and go on the ground with you to decide on the best location for a right-of-way, some time when you aren’t so busy and feel like going fishing. Meanwhile we want to concentrate the ownership in the hands of the company——” [109] A. Of one company.

Q. “——of one company. Then it will be easy to make whatever arrangements are necessary. And we can have a little fun going up the river together.

“Meanwhile the best of luck. Sincerely, Harold L. Ward.” A. Yes.

Q. Now that right-of-way that you refer to down Blue Creek then is the arrangement under which he was to be permitted to remove the timber from the Sage lands east of the Klamath across your lands and up Ah Pah and then across the green part here on this map.

Mr. Rank: Just a moment. May I have that question read back?

(Question read by the reporter.)

Mr. Rank: To which we will object as assuming something not in evidence, namely, that there was

(Testimony of Harold L. Ward.)

an arrangement. The letter looks as though there had been a discussion or a request.

The Court: Well, what you mean is that the right-of-way that is referred to here in the letter is the right-of-way that you have referred to on the map; is that what you mean?

Mr. Phelps: Yes, your Honor.

The Court: You want to identify this?

Mr. Phelps: Yes, certainly.

Mr. Rank: That is all right. [110]

Mr. Phelps: Is that right?

A. Well, there was no right-of-way and there was no arrangement. We were discussing a matter of the right-of-way up there.

Mr. Rank: The question was, Mr. Phelps, whether or not what Mr. Phelps just asked you was a matter that you were discussing in the letter. I believe that was the question.

Mr. Phelps: We will let the Court determine what it means.

A. Well, what we were discussing was the question of a right-of-way down Blue Creek and that is what the letter refers to.

The Court: You obviously intended to give him some sort of right-of-way and you were leaving open the question of the actual location of it?

The Witness: No matter of negotiating it then, no, sir. It meant a great deal to us as to just where that right-of-way would be located and some other lands that we wanted in connection with it.

Q. I say your letter indicates that you had an

(Testimony of Harold L. Ward.)

intention of giving a right-of-way but the location of it was something that was to be left to future discussions between you when you combined pleasure with business by going fishing?

A. Yes, I expected that we would have to work it out in the future some time, but it wasn't anything we wanted to negotiate then. [111]

Q. (By Mr. Phelps): But what you didn't want to negotiate then or determine then finally was the location as His Honor has just indicated?

A. Some other questions, too, in regard to this 120 acres I mentioned, and so forth. [111-A]

Q. Now, Mr. Ward, let's take the elements here. Take the logged over land first in the Blue contract, first in the hatched green lines. Is there any standing timber remaining on that?

Mr. Rank: If he knows.

Mr. Phelps: If you know.

The Witness: From the reports I have received, I believe it is all logged over.

Q. (By Mr. Phelps): You mean the reports you have received from these people, including Mr. Harvey and Fleckner and French?

A. Yes. Of course I understand there are trees left behind there, but it is all logged over and everything taken out that Mr. Wilson feels worth taking off.

Q. I don't want to play with words with you, but I want an answer to this question: Do you know whether there is any merchantable timber there standing or down in the logged over area?

(Testimony of Harold L. Ward.)

A. Well, I think there you have got a question of what do you mean by "merchantable." I think there is timber left behind there that we would consider comes in our definition of merchantable; whether it is practical now to go back and get it after he has moved out of his logging operations in that area, I don't know.

Q. Now, Mr. Ward, do you have any estimate, as owner of this [112] land, as to the value as of May 12, 1954, of all the land that you seek to recover?

A. No, I don't.

Q. You have no idea? A. No.

Q. Let's break it down, sir. Virgin timber. Do you know and is it a fact that there is approximately on the Percy French Cruise 40,000,000 feet of redwood and fir in the virgin area in Township 11?

A. The French cruise shows just about that figure.

Q. Now, as of the present time, or as of May 12, 1954, do you have an opinion as to the reasonable market value on a stumpage basis of that 40,000,000 feet?

A. No, I don't.

Mr. Rank: Just a moment, Mr. Ward. If the Court please, we are going to object to the introduction of any testimony or any evidence as to the value of the property covered by the contract at the present time or as of the date of the determination. And if your Honor is inclined to overrule the objection, I would like to be heard on it briefly under the law.

(Testimony of Harold L. Ward.)

The Court: Well, can't we take their testimony, Mr. Rank, and reserve your point by a motion to strike? I don't know whether it is or it is not important or will be an important consideration in the determination of the case, [113] and it might be better to let it in rather than to spend the time arguing about it now.

Mr. Rank: We could take the testimony, but it is liable to be rather involved testimony, and I believe under the law as it applies to this particular case, the value of the property at the time of the termination of this contract is immaterial in the face of my proposed stipulation that the value of the remaining land is as much as the balance remaining due on the contract; that with that stipulation, the value is immaterial.

In other words, the only purpose of the inquiry into the valuation is to determine whether or not the vendor has been damaged by the breach, and on that the question is whether or not the property is at a lesser value than the balance due on the contract. With the vendor's stipulation—with our stipulation that the value of the property is as much as the balance due on the contract, then I believe, under the recent cases, that the question of valuation becomes immaterial.

The Court: Are you referring to those cases that you mentioned this morning?

Mr. Rank: Yes, three cases. And the language of the last two cases, the Friedman case and the Baffa case, the theory is that the only purpose of

(Testimony of Harold L. Ward.)

inquiry into valuation is to determine whether or not the vendor has been damaged. In other words, if the value of the property remaining is less [114] than the balance due under the contract—because your measure of damages, or, not measure of damages, but the measure of the amount that the vendor might be called upon to pay starts with the question: Has or has not the vendor been damaged? And if the property is worth as much as the balance due on the contract, then he has not been damaged by the breach, and therefore the question of valuation is immaterial.

The Court: Well, I suppose that it will be urged contra that that enters into the equitable considerations that go to the determination and that may be material in determining whether or not the breach on the part of the vendee is excusable. Does it have anything to do with that?

Mr. Rank: No, it hasn't anything to do with that, except for this: That if the breach is excusable, then the Court could reinstate the vendee in the property or give him restitution by returning part of his partial payment. If the breach is wilful and the default is wilful, then the Court is precluded from reinstating the vendee in the property and the question then is whether or not the vendor is required to make any restitution, to the vendee, of any of the money paid to the vendor.

The Court: Well, what I meant was this: Let us assume that the balance due is \$160,000—is that right?

(Testimony of Harold L. Ward.)

Mr. Rank: Approximately.

The Court: And that it appears that there is property [115] that is worth, we will say just for argument, a million, say.

Mr. Rank: Yes; take any figure.

The Court: It would be then somewhat unlikely that there would be—I mean the state of mind of the vendee or his acts that would be considered in determining whether or not the breach was wilful or intentional or a mistake might be effective some-way in evaluating that.

Mr. Rank: I, frankly, had never given thought to that phase of it.

The Court: You might take into account the value of the property. In other words, it is one of the background circumstances against which may be set in turn the circumstances of the breach to see whether it is likely that the truth lies one way or another with respect to the nature of that breach.

Mr. Rank: Of course we have always wondered why they permitted the default to happen.

The Court: It seems like——

Mr. Rank: And if your Honor believes that that is a basis for inquiry into the valuation and is inclined to overrule our objection, then I am going to ask permission and leave of Court to withdraw my stipulation. Of course it was made in the pre-trial conference, but I would like then to withdraw my stipulation that the property is worth as much as the balance due on the contract, and leave the plaintiff entirely upon his proof. [116]

(Testimony of Harold L. Ward.)

The Court: That has to be determined as a matter of fact then.

Mr. Rank: Yes, if the objection is to be overruled, then let the matter——

The Court: I think the effect of overruling the objection would be to relieve you of the stipulation, because you should have the opportunity then of presenting what evidence you want or cross-examining on it.

Mr. Rank: Or let them be entirely on their proof as to value. I felt by offering that stipulation we would eliminate considerable testimony as to valuation.

Mr. Phelps: I don't see how you could have thought that if you read what I said in the transcript. I said:

“Well, this value will be at issue and we will call witnesses.”

And that was exactly my plan.

Mr. Rank: Don't misunderstand me; I thought that my objection would be good with that stipulation.

Mr. Phelps: Oh, pardon me.

The Court: If you have something further to present along that line, if that is an important consideration in the case, I will reserve ruling on it until you have further opportunity to present it. What I have said is merely by way of expression of the Court on the basis of what is now before us. [117]

Mr. Rank: May I suggest this, your Honor,

(Testimony of Harold L. Ward.)

then: That the Court reserve ruling on that objection as far as this witness is concerned.

The Court: Let's let him answer.

Mr. Rank: And permit him to answer.

The Court: I will reserve ruling on it, and then afterward you can decide where you want to go.

Mr. Rank: Yes.

The Court: And urge the objection further.

Mr. Rank: Yes.

The Court: I think that will probably save some time.

Mr. Phelps: That is satisfactory to me, but I want to make one comment so that the Court won't think that I am conceding for one moment counsel's statement of what he says these cases indicate. I don't read them that way at all.

The Court: You can argue that.

Mr. Phelps: Yes, I know, and I am prepared——

The Court: I take it you are both agreed—I gathered from the statements on both sides—that this is the sort of a case that calls for the molding of an equity decree that would have to meet the circumstances, and what standards are going to be invoked in the molding of the decree is open for further argument in accordance with the evidence.

Mr. Rank: I feel that way, yes.

Mr. Phelps: Of course that is only one of the purposes [118] I have in mind. Your Honor seizes upon one of the things we had in mind; but it is ridiculous that this person would have——

(Testimony of Harold L. Ward.)

The Court: Are you going to argue again, Mr. Phelps?

Mr. Phelps: No, I am not, your Honor.

The Court: Let's get the evidence in.

Mr. Phelps: I think the reporter has the answer for the question.

The Court: Oh, I don't know. You are going to have to go back a long way.

Mr. Phelps: The answer was he didn't know.

The Court: You don't know what the value of this 1440—five hundred and some odd acres?

The Witness: Yes, 1440—we are talking about this tract in the corner.

Mr. Rank: They are a fraction, five hundred twelve and one-half acres.

The Court: You don't know the value of that?

The Witness: No, I don't.

Q. (By Mr. Phelps): You haven't kept posted on the value of that? A. No, I haven't.

Q. You are familiar with the general stumpage prices in that area, however, are you not?

A. No, I am not.

Q. As a holder of other lands, haven't you even negotiated [119] sales of other lands within a year of this time?

A. I haven't negotiated any sales for this company for some time.

Q. Mr. Ward——

Mr. Rank: Just let him finish.

Mr. Phelps: Yes, certainly.

The Witness: There was one sale that I negoti-

(Testimony of Harold L. Ward.)

ated for Ward Redwood Company back, oh, about—I think it was '51. That wasn't—That was, however, not in this immediate area at all.

Q. (By Mr. Phelps): But it was in that general area?

A. It was down on the Klamath River, right down near the highway.

Q. And the value, I take it, since that time, has gone up, in your opinion?

A. Well, that is the general history of timber values over a long period of time, but of course it has its ups and downs, and at any particular time, you have to be intimately posted on those things.

Q. Well, haven't you had inquiries about land for sale in there and been offered, unsolicited, at least ten dollars a thousand for similar timber in the last year?

A. No, not for anything similar at all. Inquiries have come in occasionally, just did we have any timber for sale, and we haven't had any timber for sale. It is under contract except [120] for a few little pieces we have left.

Q. Was there any inquiry?

A. There was an inquiry for one small piece that the Ward Redwood Company owned down on the river.

Q. Was the price offered to you or suggested initially at \$10 a thousand?

A. I think it was, yes.

Q. And that was down on the Klamath River itself?

(Testimony of Harold L. Ward.)

A. That was down on the Klamath River itself.

Q. Where it had to be floated out?

A. Well, I think—I think there is a road up there now fairly close to the property.

Q. All right. But that is the extent of your knowledge as to what the reasonable value in May of 1954 would be with respect to virgin timber?

A. Yes. I don't actually know whether there was anything substantial to this inquiry or not.

Q. How about the logged-over land, this land that may or may not have some merchantable standing or falling timber on it, the rest of the land under the contract?

A. Well, I have no idea what value that may have, or I don't know too well what the condition of it is. I mean we have these reports on it, but still they are a long way from really telling you what the actual condition is, and even if I knew the condition, I have no idea what that would be in [121] dollars or cents.

Q. No idea at all?

A. No, I really haven't.

Q. Never been advised as close as, say, February, 1954, what you could get on a stumpage basis for what is left on the logged-over land?

A. No, I haven't had any information as to what we could get for that.

Q. So that you have no way of assisting the Court in placing a value on a stumpage basis on what remains on the logged-over land?

A. No, I just wouldn't know.

(Testimony of Harold L. Ward.)

Q. Again, Mr. French who was employed by you, W. W. French, in addition to his reports, wrote certain letters to you from time to time, didn't he?

A. Yes, those were part of his reports.

Q. He wrote to you with a carbon copy to L. S. Fletcher on February 6, 1954. Did you receive that letter?

A. It was addressed to me. I presume I did.

Mr. Phelps: A copy to his attorney.

The Witness: I presume I did.

Q. (By Mr. Phelps): So that as of February 6, 1954, you were advised that on a stumpage basis, the logged-over land could be sold for as much as you were getting for it at \$5.00 a thousand? [122]

Mr. Rank: Just a moment, Mr. Ward. May I have the letter?

Mr. Phelps: Certainly.

The Witness: I didn't notice that statement in there as I read it.

Mr. Rank: Read the whole letter.

Mr. Phelps: I will. I intend to. I will ask you if you did not receive advice as follows on February 6th, 1954:

"If I can get Mr. Wilson to commit himself with a statement that he has a significant amount of merchantable timber under the terms of the contract, I will then very readily bring him in contact with a party or parties that will pay him the same stumpage price for the remaining unlogged timber on these holdings that Mr. Wilson is obligated to pay."

(Testimony of Harold L. Ward.)

You received that, didn't you?

A. Yes, I presume I did.

Q. So that you knew in February that your representative placed a value of at least \$5.00 a thousand on the merchantable timber that was left on the logged-over land?

Mr. Rank: To which we will object as assuming something not in evidence. There are two figures in evidence, if the Court please, as to the stumpage; one was three-eighty something, and the other payment at the rate of \$5.00 a [123] thousand. I don't know what Mr. French means by that.

Mr. Phelps: Well, that is quickly handled.

Q. (By Mr. Phelps): Mr. Ward, Mr. W. W. French didn't have the slightest idea of the figure \$3.88, did he?

Mr. Rank: To which we will object that it is calling for the conclusion of the witness.

Q. (By Mr. Phelps): Let me ask you this: You received that letter. Did you take it to mean \$5.00 a thousand or \$3.88?

A. Well, I didn't actually recall it. I wouldn't think—I think it takes more than just that to establish the value of a piece of property. My experience is that you—before you actually know the value you have got to have somebody who is talking about sales, who has property to buy or sell and to have them value it.

Q. Mr. Ward, I am trying to find out what that meant to you, when he said "stumpage basis." Did it mean \$5.00, the only figure that W. W. French

(Testimony of Harold L. Ward.)

knew about, or did it mean this other figure of millions of feet divided into the \$750,000? [124]

A. I just wouldn't know what he had in mind, but maybe it was the \$5. I wouldn't know, he could testify as to that.

The Court: Five dollars was the stumpage price?

Mr. Phelps: Yes.

Mr. Rank: That is right.

Q. (By Mr. Phelps): Five dollars was the stumpage price he was to pay? A. Yes.

Q. Have you any reports or information as to the number of merchantable board feet remaining on the logged-over land?

A. Well, Mr. French made some estimate of that, too.

Q. Have you that estimate?

A. It would be in his reports. It would be in his reports.

Q. But it would run into several millions of feet, wouldn't it?

A. I couldn't tell you.

Q. All right. What about the value of the road itself? Do you recognize, Mr. Ward, that roads built on those lands have any value?

A. Well, I think it would be doubtful from a logging standpoint because the main timber has been logged off, and Mr. Wilson was doing a good deal of cat-logging, I believe—I don't mean cat-logging, I mean donkey-logging, drawing it in with cables and so on, and I doubt if the same method of log-

(Testimony of Harold L. Ward.)

ging could be used for what is left, and probably quite a [125] different system of roads would have to be established to get any salvage out of this.

Q. It has been reported to you and it is your information that Mr. Wilson has constructed excellent roads on this land; isn't that true?

A. Yes. But what I am referring to is the location of the roads for taking off the remainder. I believe it is quite different to a logging problem going into a virgin stand.

Q. But you are referring to the value of roads at the present time and restricting its value to reach the lands on the green section of the map, the Ward lands itself?

A. Yes, that is what I mean.

Q. Now don't you recognize that the roads have value as a means of tapping timber beyond it?

Mr. Rank: Just a moment, Mr. Ward. We have our same objection as to any evidence of valuation and also an objection to the valuation of this road unless it is shown that the plaintiff itself, Union Bond & Trust Company—if it is considered an improvement of the property, that Union Bond & Trust put those roads in there. In the absence of a showing that the Union Bond & Trust made the expenditures, I think any evidence as to the value of roads is immaterial in this equitable procedure.

Mr. Phelps: I am talking about the value of these particular lands as they are presently located and were so [126] located in May of 1954, Your

(Testimony of Harold L. Ward.)

Honor, and Your Honor is reserving ruling, as I understand it, on value all the way around.

Mr. Rank: This is an additional objection.

The Court: What roads are you talking about?

Mr. Phelps: I am talking about the roads presently on the so-called Ward Lands.

The Court: Counsel says you haven't established yet who put in the roads.

Mr. Phelps: Well, I can, of course, tie that up, but under my thinking it is completely immaterial. The question is what will these people get back? Will there be an unjust enrichment? What is the measure of their security? On the last question——

The Court: They may have put the roads in themselves, then they wouldn't be enriched by it.

Mr. Phelps: I see.

The Court: Technically, he is correct. There has been no evidence as to who put the roads in there.

Mr. Phelps: You will stipulate that Mr. Ward or Blue Creek didn't put those roads?

Mr. Rank: If you will stipulate that Union didn't.

Mr. Phelps: They did put in some.

Mr. Rank: Not any of the roads you are referring to. That is just the point.

Mr. Phelps: Whether they did or not, I will quickly [127] establish this much——

Mr. Rank: I don't want to quibble about this. Ward nor Blue Creek didn't put these roads in there. There is no question about that.

Mr. Phelps: All right.

(Testimony of Harold L. Ward.)

Mr. Rank: Our point is that Union Bond & Trust didn't put the roads in either.

Mr. Phelps: That may or may not be, but the fact of the matter is it goes to the ultimate value of these lands that they are attempting to get back.

The Court: All right; ask the question about the roads, inasmuch as the witness' company didn't put in the roads, and subject to the objection that has been made the witness may answer as to that.

Q. (By Mr. Phelps): Do you recognize that roads have value as access to timber beyond it and for the purpose of removing timber on adjoining lands?

A. I just wouldn't know. I don't know enough about the engineering of logging, and I don't know how much timber is left on the Sage land, or whether one road would have value and another wouldn't, or whether none would have value or whether they all would have value.

Q. Do you recognize that there is an item of value there depending on what the circumstances are?

A. Oh, surely. [128]

Q. But you can't tell us what it is, as I understand it?

A. No, no.

Q. Mr. Ward, very quickly——

Mr. Rank: We will stipulate that those were sent as indicated and received.

Mr. Phelps: We will offer in evidence, then, as one exhibit, a series of letters all dated February 17th and subsequent to and including April 15, 1954, from and to Blue Creek Redwood Company. We

(Testimony of Harold L. Ward.)

offer them as one exhibit as the letters written after that date, February 17th.

The Clerk: Plaintiff's Exhibit 6 introduced and filed into evidence.

(Thereupon, letters referred to above were received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Phelps: May I have a moment, Your Honor?

Q. I think we can do this very quickly, Mr. Ward. I want to refer you to a subject and then ask you a series of questions on it, much as we did in the deposition, to see how quickly we can cover it. With respect to the happenings after May 12th, 1954, I call your attention to incidents that you know about where Mr. Rank, Mr. Fletcher and Harvey posted "No trespassing" signs and blocked the roads and so forth and so on. Now my questions with respect to that——

First of all, so far as the posting of "No trespassing" signs and the locking or blocking of roads, that was done with [129] your knowledge and authorization, was it not, sir?

A. Yes, I would say so.

Q. The matter of advice to the employees of the various loggers that they had no right to be on the lands and to leave, that was done with your authorization, was it?

Mr. Rank: Just a moment, Mr. Ward. To which we will object as assuming facts not in evidence.

(Testimony of Harold L. Ward.)

That is a problem you get into with the first witness being a party.

Mr. Phelps: Never mind; I will withdraw that for the moment, Your Honor.

We have a stipulation, I assume, Mr. Rank, that Anne Ward, one of the defendants, is a minor, and you will later produce letters and have them marked——

Mr. Rank: They are in; they are marked.

Mr. Phelps: That is right; they are in on the pre-trial conference.

Mr. Rank: Yes, Anne Ward is a minor 20 years old and her 21st birthday is in May of 1955.

Mr. Phelps: We can also have stipulated in this record that Mrs. Virginia Palmer Ward, wife of Harold Ward, died since the commencement of this action, and of course, you will have have those proceedings in probate here?

Mr. Rank: Yes, so stipulated.

Mr. Phelps: If Your Honor please, I am pretty certain that that concludes my examination of Mr. Ward, subject to [130] going over these notes which I did rather hurriedly, and one matter that I should like to reserve over the night. I may decide, Your Honor, to withdraw it. But it is 4 o'clock. I wonder if we could take the recess to go over until tomorrow morning, and if I do have anything it won't be more than five or ten minutes.

The Court: Is that agreeable?

Mr. Rank: Yes, that is agreeable to me.

(Testimony of Harold L. Ward.)

The Court: I don't suppose you were going to examine this witness, were you?

Mr. Rank: One or two questions.

The Court: If you want to go ahead with that——

Mr. Rank: I can do it or wait until morning, it makes no difference.

The Court: Well, you might just as well wait.

Mr. Phelps: I think so.

The Court: I would like to run a little bit longer tomorrow, if you don't mind, and Wednesday, to see whether if we go into Wednesday we cannot conclude. Do you think we will be able to conclude before Thanksgiving?

Mr. Rank: I don't think so.

Mr. Phelps: I doubt it before Thanksgiving. We are shooting for the week. That is Friday.

The Court: We will have a session on Friday.

Mr. Rank: That is what I was going to ask about. [131]

The Court: Yes. We may not commence until about quarter past ten, because I am calling the Master Calendar, but it will be a very short one on Friday morning. So we may not start until a quarter past ten, but we will have a session on Friday.

Mr. Phelps: There is this situation that Mr. Rank calls to my attention, and maybe it will be easier, I don't know. If we did lap over until Friday, it might be better to go on Monday, but that is up to Your Honor. What we had in mind is that most of our witnesses are from Eureka and it is difficult

(Testimony of Harold L. Ward.)

to plan to have them down here and you don't like to have a witness down on Wednesday and then have him stay over Thanksgiving.

The Court: Why don't you wait and see?

Mr. Phelps: It is a little bit difficult, Your Honor.

The Court: I think you will have some difficulty in going on next Monday. I have some other problems in connection with some other cases.

Mr. Phelps: Let's see how we get along.

May we have an order—I am sure you will want it too—may we have an order asking that all witnesses in attendance be ordered to return?

The Court: Are there some witnesses under subpoena?

Mr. Rank: Yes, there are.

Mr. Phelps: Yes. [132]

The Court: Witnesses under subpoena will please return tomorrow morning at 10 o'clock.

We will resume the trial tomorrow morning at 10 o'clock.

(Thereupon, an adjournment was taken to the hour of 10 o'clock a.m. on Tuesday, November 23, 1954.) [132-A]

November 23, 1954—10:00 A.M.

The Clerk: Union Bond and Trust Company versus Blue Creek Redwood Company, et al., further trial.

Mr. Phelps: Ready.

Mr. Rank: Ready, your Honor.

Mr. Rank: With permission of Mr. Phelps, if the Court please, I would like to make a brief statement. In going over yesterday's transcript, I noticed something and I wanted to make this statement, that it was not my intention to give the impression that when Mr. Harold Ward was discussing any arrangement, and so forth, with Mr. Holter, that when he was mentioning the Ward properties, he was speaking for the Ward Redwood and Blue Creek. In other words, the transcript may look like we were giving the impression that he was not, but he was. When he was speaking of the Ward properties, he was talking about all of them. The only thing is my statement was at the time he was doing that, the matter had not reached corporate action; in other words, it had not reached the Board of Directors. It had not reached any corporate action as to the two corporations.

Thank you.

Mr. Phelps: I find, if your Honor please, that I have a few questions to ask Mr. Ward on about three subjects. Mr. Ward, will you please resume the stand? You have been [134] sworn.

HAROLD L. WARD

was recalled as a witness on behalf of the Plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, and having been previously sworn, testified as follows:

Direct Examination
(Continued)

By Mr. Phelps:

Q. Mr. Ward, from the reports that you were receiving currently from Mr. W. W. French, you at a later time made a compilation and a summary and worked up some figures, didn't you?

A. Yes.

Q. And those figures were derived from the information that you had back at Orchard Lake all the time?

A. Yes, the reports that were sent on beginning in June.

Q. I show you a copy of what purports to be a summary month by month and week by week of all logs removed from Ward lands and Sage lands, Ward and Sage lands, month by month and week by week.

A. Yes.

Q. And that has been marked for identification in your deposition as Plaintiff's Exhibit 1 for identification. Carbon copy of that which was used is in a little rough shape at the moment. I have a photostatic copy. A. Yes. [135]

Q. It is the same material, only a little cleaner and neater? A. Yes.

(Testimony of Harold L. Ward.)

Mr. Phelps: I will offer this as defendant's Exhibit next in order.

Mr. Rank: What is the date of that summary?

Mr. Phelps: I was coming to that. It is April 26th, 1954.

(Whereupon, the documents referred to were received in evidence and marked Plaintiffs' Exhibit No. 7.)

Q. (By Mr. Phelps): This was prepared by you or by your secretary under your direction, is that right?

A. Yes, it was prepared by my secretary.

Q. You directed her to do that? A. Yes.

Q. And it was prepared on the date that it bears, 4/26/54, April 26, 1954?

A. Well, I think the work took her over the previous week anyway of getting that together and assembling it.

Q. So for a period of about a week, she assembled that information and compiled it?

A. That is the date she completed it.

Q. And sent it to you or you received it at that time, which is it? [136]

A. I left home on April 26th to come west, and she mailed it to me on the 27th, I believe, here in San Francisco.

Q. All the information that is contained on this exhibit, Plaintiff's Exhibit 7, was information compiled from what you had back at Orchard Lake in your own records all the time? A. Yes.

(Testimony of Harold L. Ward.)

Q. And had been receiving currently, June to October, in the following month? A. Yes.

Q. For logs removed in the following month—I mean, you received in the following month for logs removed in the preceding month?

A. That is right.

Q. From that you had records which would show you, clearly and without any question, for those months that, on the Ward lands alone, without any question, there was removed in the month of June—you have nothing under the classification of Ward for June; July you show that you had information showing that 2,782,345 feet were removed in July?

A. Yes.

Q. No question about that. That was Ward?

A. Yes.

Q. All right. August you had information that 1,525,855 feet was removed—clearly Ward?

A. Yes. [137]

Q. In September, 1953, it was clear that you knew that there was 2,345,240 feet removed in September—

Mr. Rank: Just a moment. We object to the form of the question as assuming something—

Mr. Phelps: Withdraw it.

Q. (By Mr. Phelps): Your summary shows, from the records that you then had, that under the Ward classification alone, there was 2,345,244 feet for September, 1953?

A. Well, right on the face of it here there is a

(Testimony of Harold L. Ward.)

discrepancy. In one place it says 1,245,000, in another place it says 1,818,000.

Q. I will come to that, but week by week, the total, Mr. Ward, was 2,345,244 feet?

A. Yes.

Q. And then the summary by months showed 1,818,102? A. Yes.

Q. October, 1953, the weekly total, or the monthly total by week, showed 3,320,295 feet?

A. Yes. Was that last month, October or November?

Q. It was October, was it not? Yes, October, 3,320,295 feet. A. Yes. [138]

Q. In addition to those figures I just mentioned there was another column which you had which showed under Ward and Sage additional amounts that could be Ward in some proportion?

A. Yes.

Mr. Phelps: Mr. Rank, the letters of default for the months of June to October are attached to Mr. Ward's affidavit, I believe?

Mr. Rank: They are attached also to the cross-complaint.

Mr. Phelps: To the cross-complaint?

Mr. Rank: Yes.

Mr. Phelps: May we have a stipulation that those letters of default may be deemed introduced in evidence at this time that are attached to the cross-complaint?

Mr. Rank: Yes. Do you want them?

Mr. Phelps: I would like to have them physically introduced. I do not have them compiled. I did

(Testimony of Harold L. Ward.)

not want to waste the time of the Court getting them. We can furnish them later.

Mr. Rank: Here is a set that you may use.

Mr. Phelps: Counsel has just handed me five marked Exhibit A. We will offer those in evidence as plaintiffs' exhibit next in order.

(The letters referred to were thereupon received in evidence and marked Plaintiffs' Exhibit No. 8.)

Mr. Phelps: Those are the five letters, so-called current [139] letters of default covering the months of June to October, inclusive.

Q. Mr. Ward, in each of these letters there is contained the language, "Nothing herein shall be construed as waiving any other defaults on said agreement, whether or not notice of such defaults has been given nor shall anything herein be construed as waiving our position concerning the assignability of purchasers rights under said agreement."

That provision is included in every letter of that character that was sent by you to Mr. Wilson?

A. I believe so.

Q. That is since the occurrence? A. Yes.

Q. It was also included in the last one you sent on April 21 of this year?

A. I believe so.

Q. Well, that is the fact and we can establish it?

A. Yes.

Q. What did you mean by the language "not

(Testimony of Harold L. Ward.)

waiving your position concerning the assignability of purchase rights under said contract''?

A. The situation had arisen some years before where Mr. Wilson had assigned a segment of the contract, a portion of these [140] lands to someone else and to operate on its own account, and we heard at the same time that he was planning to assign segments, two other segments to other parties, and so that the whole thing would be divided up into operating segments.

Q. When was that? Was that the Big Tree?

A. Yes, the Big Tree was the first one.

Mr. Rank: 1948-1949.

Q. (By Mr. Phelps): That is what you have reference to there? A. Yes.

Q. So——

Mr. Rank: Let him finish his answer.

Mr. Phelps: I am sorry. Go ahead.

A. From an operating standpoint we had intended in making the contract that the thing would be operated as a whole, and we attached importance to that, that it should be either operated by Mr. Wilson, or if he wanted to assign it, it should be operated as a whole by someone else, because the over-all viewpoint of someone owning the whole property, we thought, would be quite different from the viewpoint of a number of small operators, and we felt that a lot of damage could be done to the property by a number of these small, individual operators.

Q. So it was your position the contract could not be partially assigned, is that right?

(Testimony of Harold L. Ward.)

A. Yes. [141]

Q. And that is still your position?

A. From the operating standpoint, yes.

Q. Is it your position it could be partially assigned from one standpoint but not the other?

A. What do you mean by that?

Q. I will withdraw it. Never mind. I will pass on to the next thing. Mr. Ward, did you ever send any other letter notifying Wilson of any other default for the months of June to October other than those contained in the exhibit last introduced, Exhibit 8? A. No.

Mr. Rank: We stipulated to that in the pre-trial conference.

Mr. Phelps: All right.

Q. Did you ever demand payments for any additional amounts for the months of June to October after you discovered this discrepancy? A. No.

Q. Did you ever at any time send any demand for payment of a specific amount?

Mr. Rank: You mean prior to the termination?

Q. (By Mr. Phelps): For the months of June to October, inclusive, prior to the notice of termination.

A. No, we never sent a demand for a specific amount.

Q. The only demands then for payment of specific amounts were [142] such demands as you sent where there was mathematical discrepancies in some

(Testimony of Harold L. Ward.)

small amounts, and that was discovered, and then you reported that and asked for payment of those specific mathematical errors that appeared upon the face of the reports that had been sent to you, is that right?

A. I do not think we demanded them. I just informally called Mr. Wilson's attention to them.

Q. By letter and asked that they be paid?

A. Yes.

Q. This has not been established and should be. The land covered by Paragraph 7 of the agreement that is included in here, 17 and 18, was, of course, under option to the Forest Service at the time in 1946?

A. Yes.

Q. That option was not exercised?

A. No.

Q. So that subsequent to that time it then came into this contract under the terms and provisions of the contract?

A. Yes.

Q. And the \$25,000 initial payment for that parcel was paid as of that time, is that right?

A. Well, it was not paid when it was due.

Q. Well, it was paid?

A. It was paid.

Q. And accepted by you?

A. Yes. [143]

Q. Mr. Rank was your attorney and still represented you and the Blue Creek Redwood Company in December, 1946, was he not?

A. Yes.

Q. And indeed had represented you for a long time prior to May, 1946, and continued to represent you up until the present time?

A. Yes.

Mr. Phelps: I have no other questions.

(Testimony of Harold L. Ward.)

Cross-Examination

Mr. Rank: I have just one or two matters that I would like to take up with Mr. Ward at this time.

Q. (By Mr. Rank): Mr. Ward, yesterday, in your testimony, in stating the reasons for the request that you made to Mr. French for information concerning the landings and rough estimate of the timber, the logs removed from the landings, you recall you stated that it was in order to check possible waste? A. Yes.

Q. Now since you have received all the information from Union Bond and Trust Company as to the total quantity of logs removed from the logged-over area, have you made a computation showing that total and comparing that total with the French cruises? A. Yes, I have. [144]

Q. Would you get that please, Mr. Ward? Is it here? A. Yes, it is in my brief case.

Q. Would you step down please and get it?

(Witness produced a paper.)

Q. Mr. Ward, I show you a large yellow sheet entitled "Blue Creek Ward-Wilson logging reports," and ask you if that correctly shows the total quantity of logs removed from the properties in question as reported by the Union monthly reports and scale sheets for the entire period of logging of land in 12/2? A. It does, yes.

Q. And it also contains, does it not, the figures

(Testimony of Harold L. Ward.)

as shown by the E. P. French cruise? A. Yes.

Q. With explanatory notes, as I understand it.

Mr. Phelps: You are still identifying this document?

Mr. Rank: Yes, I am still identifying it.

Mr. Phelps: Just preliminary. All right.

Q. (By Mr. Rank): As I understand, Mr. Ward, the figures for the June to October period that are shown were taken from the amended complaint? A. Yes.

Q. And those figures were totals with no breakdown between redwood and fir? A. Yes. [145]

Q. For the purposes of this case, you have taken the same percentages of redwood and fir as have been reported by the previous production records?

A. That is right.

Mr. Rank: And that so shows on the face of it, Counsel.

The Court: Please, we will offer that at this time as defendant's exhibit, and I would like to follow the order of the pre-trial conference. That would make Defendant's Exhibit O.

Mr. Phelps: To which there is an objection, if the Court please, that it is incompetent, irrelevant and immaterial, there is no issue involved here on any waste or what was removed as compared with the cruise. It is based on hearsay information and it is not information within the knowledge of this witness; it is without foundation, as not having been an official record made in the ordinary course of business, but indeed was made for the purpose

(Testimony of Harold L. Ward.)

of the lawsuit and made after the filing of the complaint in this action, and after the litigation arose.

The Court: What are you offering this for? To show that there was wastage?

Mr. Rank: I am offering it for two purposes primarily, if the Court please. One to show the possible effect of the French reports on the matter he was discussing yesterday in testimony. [146]

The Court: That the exhibit shows that the reason for having the report was a legitimate one, is that your point?

Mr. Rank: That is correct. That is one of the reasons. The other reason is that the amount he was removing is material in this case in another matter. That is the purpose of the showing.

Mr. Phelps: I can't see the relevancy shown with respect to that. So far as the legitimacy of it that is suggested, this was done and prepared not currently when these reports were being received, but as an exhibit in this lawsuit recently. It is without foundation in this respect.

The Court: It is only offered as a compilation of their records.

Mr. Rank: As they gave them to us.

The Court: It is subject to any correction as to the accuracy of the figures.

Mr. Rank: Yes, that is correct.

The Court: It may be admitted.

The Clerk: Defendant's Exhibit O admitted and filed into evidence.

(Testimony of Harold L. Ward.)

(Whereupon, document referred to was received in evidence and marked Defendant's Exhibit O.)

Mr. Rank: This record shows, so the Court will have it before it, that the French cruise on this showed a total in excess of 128,000,000 feet and a production according to the [147] reports on file including the shortage from June to October of 43,369,000 feet of redwood. In fir it showed in the French cruise, 31,295,000 feet and a total production of 50,000,000, with an overrun on the fir. It showed the total of the French cruise as 152,885,000 feet, and total production according to the reports of 93,776,000 or a shortage of over 59,000,000 feet.

And may I call the Court's attention that the figures in the summaries are in the thousands; in other words the Letter "M" is used to designate a thousand.

Q. (By Mr. Rank): Mr. Ward, when was the first time, if at all, that you used the so-called Harvey reports to compare or check against the Union Bond and Trust Company monthly reports?

A. In the first week in May, after I had received this summary from my secretary of the Harvey reports.

Q. That was the first time you had used these reports for that purpose at all; is that correct?

A. Yes.

Q. Prior to that time had you ever——

A. Of May, 1954.

(Testimony of Harold L. Ward.)

Q. Of 1954. Prior to that time had you ever considered checking the Wilson reports and the Harvey report or reports?

Mr. Phelps: Object to that as incompetent, irrelevant and immaterial; on the same ground. It is immaterial whether [148] he considered it. He had the information and he is bound by the knowledge of it, and on that ground it would be immaterial.

Mr. Rank: We are talking about clean hands and unclean hands, if the Court please, and the witness has already explained the purpose of these reports, and I think it is material to show that he never used them for the purpose that they are talking about, never even considered it, and why he didn't consider it.

Mr. Phelps: That gets into the question of motive again and what went through his mind in reaching the decision, as to which I thought it was considered that it was a question of what was done rather than motive. I may be mistaken on that.

The Court: I expressed myself with respect to what you were trying to show in that respect.

Mr. Rank: That is right.

The Court: I still am of the same view.

Mr. Rank: Very well.

The Court: I don't see what motive has got to do with it on either side.

Mr. Rank: Of course I haven't asked him the motive, but the reason why he didn't consider the

(Testimony of Harold L. Ward.)

question of checking the Harvey reports against the Wilson reports of April and May, 1954.

The Court: Well, you cover that, don't you? That calls for a mental process and you have already presented evidence, [149] the witness has testified as to the purpose for which certain reports were obtained and that he had the reports or got the reports for that purpose, and that the first time he did anything with the reports with respect to the matter of any default on the part of the Union people was at a certain time, so the record is merely the opinions and conclusions of the witnesses, isn't it?

Mr. Rank: We will withdraw that at the present time. We can possibly cover that in our direct with Mr. Ward.

Q. (By Mr. Rank): Mr. Ward, since receiving and having in your possession these various records, including the Harvey reports and the Union Bond and Trust Company logging reports, and from those records and from the dates that you received those various records, had you compared and checked the Harvey reports against the Wilson reports, what is the earliest possible time that a possible discrepancy could have been discovered?

Mr. Phelps: That is argumentative, and calling for an opinion and conclusion and is hypothetical.

The Court: It is conjectural, isn't it?

Mr. Phelps: Conjectural to say the least.

The Court: You are asking him to say what the

(Testimony of Harold L. Ward.)

earliest time was. Let him state the facts, that is all.

Q. (By Mr. Rank): Mr. Ward, when did you receive the Union Bond and Trust monthly report for the month of July? [150]

A. Late in October.

Q. Late in October? A. Yes.

Q. As I understand from your testimony, you had received sometime earlier, the Harvey report, but you received the Union Bond and Trust report showing quantities removed in July late in October; is that correct? A. Yes, sir.

Mr. Rank: That is all, Mr. Ward. [151]

Redirect Examination

By Mr. Phelps:

Q. This Exhibit O, the information developed on there insofar as it shows the logs removed, was all information which you had currently in your files in Orchard Lake; is that not so? A. Yes.

Mr. Rank: You are referring to Exhibit O?

Mr. Phelps: I am referring to Exhibit O.

Q. Nothing new was used, no new investigation, it is just certain records that you had all the time?

A. Yes.

Mr. Phelps: I have no other questions. Thank you.

The Court: That is all.

Mr. Rank: Just one moment, Mr. Ward.

(Testimony of Harold L. Ward.)

Recross-Examination

By Mr. Rank:

Q. Mr. Ward, Mr. Phelps asked you if you had this information all the time. When did you receive the information as to the logs removed since, we will say, October of '53? Can you relate that?

A. Could you repeat that question?

Q. The information as to logs removed currently in 1954, January, February, March and so on?

A. And since October, '53?

Q. Yes. [152]

A. Since October '53, the information simply comes from the logging slips.

Mr. Phelps: I had in mind through October, 1953, and if there was anything in my question that went beyond October '53, I will stipulate that his last answer referred to information prior to October of '53. I didn't have anything else in mind.

Mr. Rank: In other words, you are not contending that he had the October 1953 information in October, are you?

Mr. Phelps: No.

Mr. Rank: All right. That is all, Mr. Ward.

(Witness excused.) [153]

* * *

WILLIAM W. FRENCH

was called as a witness for the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the [178] truth, testified as follows:

The Clerk: Will you please state your name for the Court?

A. William Wallace French.

Direct Examination

By Mr. Phelps:

Q. Where do you live, sir?

A. I live in Fortuna.

Q. That is just south of Eureka, is it, about 12 miles or so?

A. About 20 miles.

Q. What is your business or occupation, sir?

A. I am a timber cruiser.

Q. And have been in that business all your working days, is that right?

A. Practically so speaking.

Q. Mr. French, you are familiar with the lands of the Blue Creek-Ward lands indicated on this map Plaintiff's Exhibit 1, and the Sage lands shown in yellow?

A. Yes.

Q. Now, you undertook to do some work on behalf of Mr. Ward or the Blue Creek Redwood Company in connection with those lands sometime late in the fall of 1952; is that right, sir?

A. Yes, I believe that is right.

Q. And for that purpose you hired a man named Ernest Harvey to check in the woods on the woods operations? [179]

A. Yes, sir.

(Testimony of William W. French.)

Q. On your behalf, is that right?

A. Yes, sir.

Q. And he was employed by you for the purpose of policing the log distribution, checking the brands, checking the logs and so forth coming out of the Ward-Sage properties? A. That's right.

Q. And Mr. Harvey then made a diary, a daily diary in the calendar year '53—let's move into the year '53, sir. A. All right.

Q. In the calendar year 1953, Mr. Harvey made a daily diary and made those reports in long-hand and then in your office you had them typed up or put on a type of paper that could be reproduced, some sort of blueprinting paper?

A. Yes.

Q. And then those were sent on in that form to Mr. Ward in Orchard Lake, Michigan and to Mr. Fletcher in Oakland; is that right, sir?

A. That's right.

Q. That was done weekly?

A. Yes, the reports were made up weekly.

Q. And sent on weekly or monthly, sir?

A. I think they were sent monthly.

Q. In addition to that you had these other reports, these so-called log scales, of the Ward-Sage-Wilson contract; those [180] reports were commenced in April or May of '53 and continued throughout the calendar year '53?

A. That's right.

Q. Those were reproduced by some sort of blueprinting method and copies of those were sent on to

(Testimony of William W. French.)

Mr. Ward in Orchard Lake, Michigan, and to Mr. Fletcher? A. Yes, sir.

Q. From whom did you get your instructions as to what you should do on behalf of Mr. Ward?

A. My instructions were when we first went in there on this set-up——

Q. Just from whom did you get them first and I will ask that.

A. From Mr. Ward originally; that is he wanted to find out—not only Mr. Ward but the Sage people and the Barrel Company and also the Arrow Mill, to try to see if we could get any line—put a man in there to check and keep a proper distribution of those logs so that each one would rightfully get their logs.

Q. Yes. And that was the principal purpose of Mr. Harvey's activities?

A. At that time, yes, sir.

Q. Now at any time after you sent these reports on to Mr. Ward or Mr. Fletcher either one, did you ever receive any instructions to get some additional information that you weren't covering? [181]

A. Well, I imagine we did.

Q. Do you know of any? Would it be by correspondence? A. I think there is a letter on that.

Q. You are referring to May of '54. I mean during the calendar year '53, sir.

Mr. Rank: Well, if you have a letter here, why don't you show it to him?

Mr. Phelps: It is quite the reverse. I know of no letter; I want to just simply show—he has said

(Testimony of William W. French.)

that the only instructions are his original instructions as to setting up a procedure; isn't that right?

A. Well, I wouldn't say the only ones, no. We were put in to start with, I put this man in there to police that situation.

Q. Let me ask it this way; this will help: After you sent those reports in, along the middle of the summer of 1953 did you get a letter from Mr. Fletcher?

Mr. Phelps: This is July 21, Mr. Rank.

Mr. Rank: I beg your pardon?

Mr. Phelps: July 21st letter.

Q. Put your glasses on. On July 21st, 1953, you received a letter stating as follows:

"I believe the reports that are now coming in are most helpful and informative. If I have a suggestion to make it would be that a little more general information be given concerning the type of logging [182] now being done by the Coast Redwood Company and its various contract jobbers."

You received that letter commending your reports from Mr. Lawrence L. Fletcher of Hardin, Fletcher, Cook & Hayes? A. Yes, sir.

Q. You were charging for those services—it was divided into three groups; it was split three ways between Arrow Mill, and California Barrel and Ward; is that right? A. That's right.

Q. And you were being paid monthly as the figures are indicated—and I shall not read them to you now—as indicated in the bills and copy of the bills that you sent? A. Yes, sir.

Q. In those amounts for the months shown, and

(Testimony of William W. French.)

in those amounts? A. Yes.

Q. Now then, in 1954, on January 29, 1954, you received the letter that I now show you from Hardin, Fletcher, Cook & Hayes by Mr. Lawrence L. Fletcher, did you not?

A. Yes, sir, I did.

Q. And pursuant to that letter you were asked—this is just for identification. Does that refresh your recollection that as of that time you were asked to check on the logging operations up there and check the months of May through October of 1953? [183]

A. Yes, I believe that is correct.

Q. And as of that time you were furnished information month by month from May, '53, to October, '53, of the amount that had been paid under the Blue Creek contract and the amount of the stumpage reported, weren't you? A. Yes, sir.

Q. And then did you undertake to check those figures and compare those figures as to what was paid and reported with what was taken out?

A. Just from what we had from our record, yes.

Q. And the first step of that check was to go to the office of the Coast Redwood Company; is that not so? A. That's right.

Q. And do you remember when you did that?

A. I can't really recall the date, no.

Q. Did you make that trip with Mr. Fleckner?

A. I did, yes, sir.

Q. And Mr. Fleckner is identified as the gentleman that is sitting here in the first row?

A. That is right.

(Testimony of William W. French.)

Q. He was working with you on this matter?

A. Yes, sir.

Q. An employee of yours?

A. That's right. [184]

Q. And on that occasion when you went to the Coast Redwood Company mill, did you check the Coast Redwood stumpage records?

A. Yes, I believe we did.

Q. You asked for that information and it was freely given to you? A. Yes.

Q. And from that you determined, did you not, sir, that the Coast Redwood Company records of amounts removed checked with the amounts that were paid according to these figures that had been sent to you in May?

A. I believe that is correct.

Q. Now, what was the next thing that you did?

A. Well, I believe there was some records that wasn't there; I believe it was the Union Bond records.

Q. So that as of that time—and this was February 17th or 18th—does that refresh your recollection? A. I believe it was in that date, yes.

Q. And on February 17th or 18th, when you went to the Coast Redwood Mill, you knew as of that time then that the only amounts that had been reported and paid for were those removed by Coast Redwood Company?

A. As I recollect, that's right.

Q. And as of that time, you knew that there

(Testimony of William W. French.)

were other logs that had been removed by Union Bond and Trust Company?

A. That's right. [185]

Q. You knew currently when the Union Bond and Trust Company first commenced logging; you were so advised by Mr. Harvey, weren't you?

Mr. Rank: To which we will object as calling for the conclusion of the witness and the records speak for themselves.

Mr. Phelps: I am asking him. He is the man in charge of this investigation.

Mr. Rank: You haven't shown that Mr. French ever examined or saw those records.

The Court: No; he asked him a different question now. He asked him whether or not he was advised when the Union first went in itself to do the logging operations.

Mr. Phelps: Yes.

The Witness: Yes, I had been so advised. That will appear on the records also.

Mr. Rank: May I have that question and answer?

(The Reporter read the last question and answer.)

Q. (By Mr. Phelps): Now, with respect to the Union Bond and Trust Company books, first of all, when you went to the Coast Redwood Company office—you and I know this, but the Court doesn't—the Coast Redwood Company office was at the mill on the Samoa Peninsula? A. That's right.

(Testimony of William W. French.)

Q. Mr. Paul Owens was the accountant at that time and he had his office in the town of Arcata? [186]

A. That's right; Studebaker Building, I believe it was.

Q. That is some four or five miles removed—there is some little distance between them?

A. Yes, there is.

Q. When you went to the Coast Redwood Company office, the girl there at the office showed you a book which she opened out for you, a ledger sheet, showing the stumpage paid by the Coast Redwood Company month by month; is that right?

A. I believe that's right.

Q. And that is how you compared those figures?

A. Yes.

Q. All right. What about Union Bond and Trust Company? Did you compare any Union Bond and Trust Company books at that time or——

A. I was informed that they didn't have them there.

Q. All right. And were you told to then go and see Mr. Paul Owens in Arcata? A. Yes, sir.

Q. And did you later do that, sir?

A. I did call up Paul's office, yes.

Q. And when did you do that?

A. I believe it was the next day or the day after.

Q. Did you call him by telephone or did you go to his office, as you recall?

A. I believe Paul called me. [187]

(Testimony of William W. French.)

Q. All right. What did you do after that telephone call?

A. I made the visit to Paul's office.

Q. Do you remember the date of that visit, sir?

A. No, I wouldn't know.

Q. Let's see if we can refresh your recollection on that. Just to refresh your recollection to fix the time, do you recall if Mr. Owens—here is a letter to Fletcher, saying, "Mr. Owens phoned me Thursday evening"—the letter is dated February 19th?

A. That is correct.

Q. 1954.

"We have made an appointment with him for the middle of this coming week."

So you then thereafter kept that appointment?

A. I did, yes.

Q. In the middle of the following week?

A. I believe that's right.

Q. On that occasion when you met with him, did you go with anybody? A. Did I what?

Q. Were you accompanied by anybody?

A. No, I was by myself.

Q. Was there anybody present other than Mr. Owens? A. Just Mr. Owens and myself.

Q. At that time, on that occasion, sir, did you ask to see [188] the stumpage ledger, the books for the stumpage of Union Bond and Trust Company on the Blue Creek or Ward properties?

A. Yes, I believe I asked him for the checkup of the scaling slips.

Q. Didn't you ask him to check with the same

(Testimony of William W. French.)

record that you had seen before, the ledger sheet first?

A. No, I was asking—we had had the other; I was asking for the Union Bond and Trust Company.

Q. But didn't you ask him to see the stumpage record, the ledger sheet? A. That's right.

Q. The sheet that folds out, of which you had seen a similar sheet in Coast Redwood?

A. Of course I didn't know what form he had them in. I was asking him for a check on those records.

Q. At that time, what did he tell you?

A. He told me he didn't have them in the office; but they were in the Portland office.

Q. And did he tell you anything else that you recall?

A. Yes; if I wanted to check on them, I would have to go to the Portland office.

Q. Did he tell you anything else?

A. I can't recall anything particular.

Q. Don't you recall that he told you that the ledger sheets were in Portland and that you could either go there or if you [189] wanted, he would have them brought back here for you? Do you recall that?

A. I don't recall; it is possible he said it.

Q. Just to refresh your recollection, will you read your testimony here and see if that can refresh your recollection? A. This one (indicating)?

Q. Yes.

(Testimony of William W. French.)

Mr. Rank: What page?

Mr. Phelps: 67.

Q. (By Mr. Phelps): Having read that, does that refresh your recollection?

A. Yes, I remember that, but I can't remember that he said he would have them sent back. He might have said that now in our conversation. At least, we never did get together again.

Q. You were asked this question:

"Well, at any rate, you and he agreed that you would get together on a later date and figure out"—

A. That's right; he did say that.

Q. "—that you would get together on a later date and figure out what this discrepancy was?"

A. Yes, sir.

Q. And your answer to that at that time was:

"Well, that could be true or it couldn't be. I can't recall that remark." [190]

Do you now recall it?

A. I believe he did, yes.

Q. You then said:

"I remember going there for the purpose of those records, and they weren't present; and it seems to me that he explained to me that I would either have to appear in Portland or have the records sent back here."

You remember that, don't you?

A. He did say I would have to go to Portland to get the records; I can't recall him having said he would have them sent back. He could have, though.

(Testimony of William W. French.)

Q. You just so testified on November 4th, this month? A. It could be possible, yes.

Q. Did you have any further conversation with Mr. Owens?

A. That was very short. I don't believe there was much more said on the subject. [191]

Q. So that after leaving him, it was your understanding that you would later get together and straighten it out, isn't that right?

A. I believe that was the understanding all right.

Q. Is that the last time that you saw Mr. Owens? A. As I can recollect, it is, yes.

Q. Did you ever go back to Mr. Owens and straighten this matter out with him?

A. No, sir.

Q. Did you ever request of him at a later time that he send those records down from Portland to you? A. No, sir.

Q. Did you ever make any request to see those records in Portland?

A. No, sir, only the one that I made at the time I was there.

Q. After that meeting with Mr. Owens in February you then reported the results of that to Mr. Fletcher by phone, is that right?

A. I believe it was, yes, sir.

Mr. Rank: You are referring to the last meeting with Mr. Owens.

Mr. Phelps: Yes, that would be the last. I may be mistaken. I thought that was by March 15, 1954.

(Testimony of William W. French.)

Q. Then you had made no further effort to see Mr. Owens to straighten this matter out, is that right? [192]

A. That is right. Personally I did not.

Q. On March 15th, 1954, Mr. French, you received a letter dated March 15th, 1954, from Lawrence L. Fletcher? A. Yes.

Q. In that letter you were requested and told first that Mr. Rank "was coming to Eureka within a few days and will contact you with regard to the matter; that in the meantime, if you have not had your discussions with Mr. Owens, I would suggest you would hold off until Mr. Rank sees him." Is that right? A. That is right.

Q. After March 15th, 1954, then, your holding off seeing Mr. Owens was on instructions from Mr. Fletcher? Well, I will reframe the question. Did you comply with his instructions to hold off seeing Mr. Owens or did you go to see him?

A. I did not.

Q. You mean you did not go to see him? You did not comply with the instructions?

A. I guess I did.

Q. Then the next step was some conferences with Mr. Rank, who did come to Eureka, isn't that right?

A. That is right.

Q. You did not do any further investigation or ask or direct that any further investigation be done other than what you have already testified to? [193]

A. That is right.

Q. You were instructed during the month of

(Testimony of William W. French.)

April to be careful and not say anything to anybody about the possibility of termination or what would be done because of this discrepancy; isn't that right?

Mr. Rank: May I suggest that you show him the entire letter.

Mr. Phelps: I sure will. But, first of all, let me ask this question. I will withdraw the other.

Q. During April of 1954, did you make any further efforts of any kind to try to resolve and find out what this mistake was all about?

Mr. Rank: To which we will object as incompetent, irrelevant and immaterial.

(Question read.)

Mr. Rank: He was not under instructions. That was not his job or his duty. It is incompetent and irrelevant and immaterial whether he did or not.

The Court: I take it the answer would be no because he was only the cruiser.

The Witness: I carried on my duties as I thought was the proper thing to do regardless.

Q. (By Mr. Phelps): You were instructed with respect to the investigation of this particular matter, were you not, by a letter of April 26th, 1954, a letter "Dear Bill," signed, [194] "Carlton L. Rank."

"Mr. Ward, on the other hand, was discussing the possibilities of action in the matter that we discussed at Eureka. Mr. Ward expects to be out here in a day or two and in the meantime just go on as you have been without saying anything to anybody

(Testimony of William W. French.)

about our thinking. I will be in touch with you within a week or two." A. Yes, sir.

Q. What was "our thinking" as expressed in that letter? A. That must have been his.

Q. Had he had any discussions with you at that time? What did it mean to you?

Mr. Rank: Just a moment. To which we will object as calling for the conclusion of the witness.

Mr. Phelps: He received the letter.

The Court: If he knows he can state what that meant.

Mr. Phelps: What did that refer to?

A. I will add, so far as our work was concerned, we always carried on without talking.

The Court: It is difficult for me to rule on some of these matters, Mr. Phelps, because you are going hindside first into this case. I have not yet heard any of the facts concerning the default, the nature of it, what the circumstances were. You are apparently going way ahead into whether or not there was some estoppel, waiver, or some act on the part of [195] the other party that excused something that I have not yet heard about. It makes it very difficult to rule on the materiality of this. I am going to let most of it because I can't tell what you are getting at. I am not meaning to be critical about it. You have your own ideas of how to present it, but it presents some difficulty in ruling on it.

Mr. Phelps: I had these witnesses under subpoena and I did want to dispose of them.

Q. Then on April 30th, 1954, you replied to that

(Testimony of William W. French.)

letter, and in part of that reply you say this: "We would appreciate a few days' notice in anticipation of what detailed questions may arise shortly. Due to the recent developments we have tried not to be conspicuous in the nature of some information."

What did you mean by that?

Mr. Rank: To which we object as incompetent, irrelevant and immaterial.

The Court: What is the point?

Mr. Phelps: I will explain it if I may, your Honor. The purpose of it is this: With knowledge on the part of Mr. Ward as to what the true facts were, their conduct after that in connection with waiver and estoppel is important, and so here we have instructions to be quiet about it, to be inconspicuous, don't let them know about it, and then after those things happen we find they have accepted payments under the contract, and so forth, and on that issue we think it is important, and [196] material, but I won't press it.

Mr. Rank: There is no evidence that Mr. Ward knew all the facts as of that date in the first place.

Mr. Phelps: This is his agent. I can prove his knowledge to the agent, if Your Honor please.

Mr. Rank: That was your explanation, as I understood.

The Court: I do not see why in an action concerning a contract or its performance by either party that there is something introduced about proceeding in secrecy. They do not have to emblazon the fact to the world, do they? Sometimes it is dif-

(Testimony of William W. French.)

ficult to get information if you need it in connection with some claim that you have. Human nature is not always the same. Everybody does not give out things. You have to dig them out sometimes. I do not see the particular importance of it.

Mr. Phelps: Then let me not press it at this time, Your Honor. I will withdraw it at the moment, and if its materiality becomes apparent at a later time, the record is always here and we can offer it at that time.

Q. We will go back then to your conversation with Mr. Owens at the Arcata office there. First of all, with respect to this so-called discrepancy, did you advise Mr. Owens that there was apparently a discrepancy, or did you just ask permission to see the books?

A. No, I told him there was a discrepancy as far as I could [197] recall it.

Q. Do you remember saying that, sir?

A. No, I don't exactly remember saying it, but I can't recall all those conversations. But I went there for the purpose of checking with records to see if we could locate this discrepancy.

Q. But you are not able to say, and you are not saying, are you, that you advised Mr. Owens at that time of any discrepancy?

A. No, I had been advised.

Q. Yes, you had been advised?

A. That is right.

Q. With respect to the records that you wanted

(Testimony of William W. French.)

to see, those were records that you wanted to check at that time, didn't you? A. That is right.

Q. And the record you wanted to check was in convenient form, in summary form, in the ledger, wasn't it?

Mr. Rank: Assuming he knew what the records were. He testified he did not know.

Mr. Phelps: Withdraw that question.

Q. Will you state whether or not in going there to make that comparison whether the type of record that you wanted to check it with was one in summary form such as you had seen in Coast Redwood?

Mr. Rank: To which we will object as being argumentative [198] and asked and answered.

Mr. Phelps: I do not think that has been.

The Court: I think you are spending an awful lot of time on that. He went there to check some records to see what he could find out about the matter, that his principal asked him to do. What difference does it make what kind of record he was going to look at?

Mr. Phelps: I will withdraw the question, if Your Honor please. That is all.

Mr. Rank: No questions, Your Honor, but I would like to check my notes.

The Court: If you wish to.

Mr. Rank: Yes, because this witness is from Fortuna. If there are any matters I want to ask him, either on cross-examination or otherwise, I will

(Testimony of William W. French.)

do it while he is here and I would like the noon hour to check.

The Court: We will excuse them now. Back at 2 o'clock. We will take a recess then until 2 o'clock.

(Thereupon, a recess was taken to the hour of 2 o'clock p.m. this date.) [199]

November 23, 1954, at 2 P.M.

Mr. Rank: Were you through with Mr. French, Mr. Phelps?

Mr. Phelps: Yes, I was. Were you?

Mr. Rank: Just a couple of questions.

WILLIAM W. FRENCH

called on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Rank:

Q. Mr. French, did you have any knowledge or information at any time prior to receipt of the letter of January 29th, 1954, from Mr. Fletcher, which I now show you, and which had attached to it some figures, any information or knowledge prior to that date of the quantities of logs that Union Bond & Trust was reporting monthly to the Wards?

A. No, sir.

Q. Or the amounts that were being paid?

A. No, sir.

(Testimony of William W. French.)

Q. Had you ever seen or had in your possession or had turned over to you any of the monthly reports from Union Bond & Trust to the Wards?

A. No, sir.

Mr. Rank: Mr. Phelps, is it your plan to put in this [200] correspondence that you have been asking Mr. French about?

Mr. Phelps: I think we ought to, yes.

Mr. Rank: You are going to put in this whole thing; because if you are, I won't bother to ask him questions about it.

Mr. Phelps: Not only that, but anything you want to put in out of the same file is perfectly all right.

The Court: Why don't you decide what you want to put in and put it in now?

Mr. Rank: Why don't we put in both the 1953 correspondence file and the 1954 correspondence file?

Mr. Phelps: I do not know that it is all material. There is a lot of hearsay, and so forth. I do not want to encumber the record.

Mr. Rank: While you are deciding that——

Mr. Phelps: What particular things did you want to put in?

Mr. Rank: Just one thing in particular at this moment.

Mr. Phelps: What is that?

Mr. Rank: That is Mr. French's reply to the letter of January 29th.

The Court: That letter of January 29th is not

(Testimony of William W. French.)

in evidence. Counsel has read from it but it is not in evidence. The letter addressed to the witness?

Mr. Rank: Yes. If the Court please, we were going to put that letter in evidence as part of our case. [201]

The Court: It does not make any difference how you put it in. Put it in.

Mr. Phelps: It doesn't make any difference. If you want to put in that letter of January 29th, that is perfectly all right.

Mr. Rank: I will let you do the work and I will ask the witness about this next letter.

Q. Mr. French, after receiving the letter of January 29th, 1954, from Mr. Fletcher, did you reply to him, and I show you a copy of a letter dated January 31st, 1954, addressed to Mr. Fletcher, and ask you if that is your reply?

The Court: Any objection to these letters going in evidence?

Mr. Phelps: I just want to see it, because I do not carry its contents in my mind, Your Honor.

Mr. Phelps (To Mr. Rank): Wouldn't it be quicker if you showed it to me?

Mr. Rank: You mean the letter that he is reading?

Mr. Phelps: Yes. If you showed it to me I could tell you whether there is any objection or whether it could go in by stipulation.

Mr. Rank: I just asked Mr. French a question and he is reading the letter to see whether or not he sent it.

(Testimony of William W. French.)

Mr. Phelps: I was just trying to shorten it.

The Witness: Yes. [202]

Mr. Phelps: Mr. Rank, as you suggest, I am prepared to stipulate that all the 1953 and all the 1954 correspondence be marked and introduced in evidence. It doesn't make any difference whether it is yours or mine.

Mr. Rank: Flip a coin.

Mr. Phelps: Make it plaintiff's, as long as I called it.

(The 1953 and 1954 correspondence referred to was thereupon received in evidence and marked respectively Plaintiff's Exhibits Nos. 9 and 10.)

Mr. Rank: That is all, Mr. French.

The Court: That is all.

(Witness excused.)

Mr. Phelps: While we are on the same subject may we offer in evidence the bound volume of the 1953 Harvey reports, general remarks and policing of log distribution of the Coast Redwood Company's logging operations as Plaintiff's Exhibit next in order.

(The volume referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Phelps: So far as I am concerned, Mr. Rank, the last witness, Mr. French, being from

Eureka, he may be excused so far as I am concerned and so advise him.

Call Mr. Owens. [203]

PAUL C. OWENS

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

A. Paul C. Owens.

Direct Examination

By Mr. Phelps:

Q. Mr. Owens, your address, sir?

A. I live in Eureka, right in Eureka.

Q. And your business or occupation, please?

A. I am a public accountant.

Q. Engaged as such in the Arcata-Eureka area?

A. That is right.

Q. With your offices where?

A. In Arcata.

Q. At what address in Arcata?

A. 19 Sixth Street.

Q. How long have you been in the public accounting work?

A. Well, actually for about three years, the last two of that exclusively. I did some work on the side for about, oh, the last 7 or 8 months that I worked as an employee of Coast Redwood.

Q. So going back historically there was a period of time when you were an employee of the Coast Redwood Company? [204]

(Testimony of Paul C. Owens.)

A. That is right, up to March 25th, 1953. Subsequently I was no longer an employee of the company.

Q. Up until that time what was your position with the Coast Redwood Company?

A. As office manager.

Q. There at the mill?

A. At this mill office.

Q. Where is that mill? Will you locate it for us?

A. The mill is a little over four miles out of Arcata on the Arcata-Samoa road.

Q. Does it have a designation that it is commonly known as, so we can use the term?

A. It is known as the Manila Spur.

Q. Sometimes known as the Manila Mill. Is that where the Coast Redwood Company has its offices?

A. That is right.

Q. And it did in 1953?

A. That is correct.

Q. In 1953, in April, there was a change in the situation so far as Coast Redwood Company was concerned, brought about by the filing of a Chapter XI proceedings in Los Angeles. You are familiar with that? A. Yes.

Q. Was that in April, 1953, am I correct?

A. No, the actual filing was January 30, but subsequently [205] the mill was closed down and the operations closed on March 25th on a temporary basis, but it still ran under the Chapter XI proceedings until that time.

Q. When did you make your change?

(Testimony of Paul C. Owens.)

A. Right thereafter.

Q. After that period of time, March, 1953, all through the calendar year of 1953, what was the arrangement that you had in connection with any work for Coast Redwood Company?

A. Well, my arrangement was right directly with the court and with the debtor in possession, and there was a court order signed to that effect, that I would be hired in the capacity of the public accountant to do certain work at so much per thousand, which was my fee basis, rather than have a flat fee.

Q. What kind of records on behalf of the Coast Redwood Company did you keep or supervise the keeping of? What were they? What was the routine? Explain to us if you will.

A. The route was more or less of a similar nature as had been carried before, except the fact that after that time we had paydays every week, a complete payday, rather than semi-monthly. That meant for the entire woods crew, loggers, truckers, everybody, and I maintained the payroll records, sales records, cash receipts records and check records, log haul records, log sales records, and stumpage records.

Q. Are you confining this to Coast Redwood activities for the moment? [206]

A. Yes.

Q. Where were those records kept?

A. At the Manila office.

Q. That was the Manila Spur you were talking about?

(Testimony of Paul C. Owens.)

A. That is right. They were kept in the mill exclusively.

Q. The actual making of the entries was done by whom? A. Well, at the start——

Q. I don't want to get into that. It is all right if they want on cross-examination names, but what I am trying to find out is did you do it or somebody under you?

A. Part of it. Part of it was done by me and part of it done by my employees.

Q. Will you explain to us, please, as far as the Coast Redwood Company affairs were concerned, how the stumpage records were kept, the scale records, the log hauling and such that had to do with the records of the removal and the sales of timber on the Ward and Sage lands?

A. Well, there was a separate record kept. It has to do with stumpage—a separate record for Ward and a separate one for Sage Land & Lumber Company. They are the two companies which were the stumpage owners.

Q. When you say a record, was it posted in a book?

A. They were posted right from the original white ticket into a ledger.

Q. I think you ought to explain for us the slips. There is [207] a white slip, pink slip, and so forth. Explain that for us.

A. All right. There are four slips that we had originated in the woods. The scaler in the woods makes these out, an original and three carbons. The

(Testimony of Paul C. Owens.)

white slip is thereby kept in the woods at the time. The trucker takes the pink, the blue and the yellow with him at the time his logs are delivered to the mill, wherever it is designated. He then has the pink slip and the blue copy signed. The mill keeps and holds for their records the yellow copy. The trucker then brings back the pink ticket to the woods, gives it back to the scaler. That pink ticket is our evidence, when we get it in the office, that that load of logs is delivered and is signed by the mill owner or the mill scaler, as it may be, and the pink and white papers are all in the office. And if I might say this, this white paper is brought in every day, but the trucker, he might get sick and we don't get the pink slip for a week, sometimes not for a month. Then that pink ticket is used to send to the stumpage owners. [208]

Q. You have told us about the records that were kept in the mill by employees down there and you would go down there and supervise it and make some of the entries yourself, is that correct?

A. That is correct. That is correct.

Q. When did the Union Bond and Trust Company first commence any logging on its own account?

A. In April. In April, yes; I checked that. In April of 1953, they started logging.

Q. Now first of all, in April of 1953, when Union Bond and Trust Company commenced the logging, what instructions did you receive or what were

(Testimony of Paul C. Owens.)

your duties with respect to that? Will you define those for us?

A. Yes; when the deal was originally made, as I recall I talked to Mr. Wilson very briefly at the start of this operation and he asked me if I would like to keep these records or part of them for him in view of the fact that I was keeping many records which I had maintained for him.

I said, yes, I would. And shortly thereafter, during the month of April, Mr. Herdon, Max Herdon, of Yergin and Myer——

Q. Who is Yergin and Myer?

A. Yergin and Myer are auditors of Portland, Oregon, with an office in Medford, that have been doing the work for Mr. Wilson for several [209] years.

Q. Where was the principal place of business of Union Bond and Trust Company?

A. In Portland, Oregon.

Q. Yergin and Meyer were accountants for that firm?

A. So far as I know, yes.

Q. What did they do?

A. And at that time I talked to Mr. Herdon in regard to what records I should keep for Union Bond, and he told me that at the time, that any records I should keep should be for only the payments to loggers, truckers, and current operating expenses and so forth there; that due to the fact that Union had other operations about which I know nothing and never have, and don't know now, the records should then be sent in to Portland for entry into

(Testimony of Paul C. Owens.)

final books and that it would be useless for me to keep a set of books, and they could keep a set of books when my information would be relatively small.

Q. All right. That was in April, 1953?

A. That's right.

Q. When Union first commenced logging in April, 1953, from what lands were they logging at that time?

A. Well, it was from—off of Section 16; I remember that that is what it was called, and it was my understanding—I wasn't sure, but I believe they were branded with a "W" or Ward as from prior Ward lands, what they were at that time—I assumed then they were.

Q. All right. But at any rate, with respect to Section 16, [210] you are not talking about Section 16 in area shown on this map, are you?

A. No, as it so happens, it is up near the river.

Q. It wouldn't even be shown on this map?

A. No, that is correct.

Q. With respect to that logging operation, when it was commenced, what instructions did you receive from Mr. Wilson with respect to stumpage payments on those lands or the handling of pink slips?

A. That was brought up—probably sometime in June or sometime around there; I don't know when it was. It was probably, I imagine, a couple of months afterwards, it was the normal procedure, as I recall the answers that he gave me, the way it was brought up, he says, "We own that land, we

(Testimony of Paul C. Owens.)

don't owe any stumpage on it." He says Union wasn't paying any stumpage.

Q. Where was that land that you were referring to?

A. At that particular time it was in 16, although they were logging other places.

The Court: 16 isn't involved?

Mr. Phelps: That isn't involved here.

The Court: Who was it that said this?

The Witness: Mr. Wilson told me, sir.

The Court: I thought it was the accountant. Go ahead.

Q. (By Mr. Phelps): All right. So what then did you do and what was your practice in the following months from April thereafter [211] with respect to Union Bond and Trust Company records, or what were you doing?

Mr. Rank: Just a moment, Mr. Owens. May I have that question read, please?

(The Reporter read the question.)

The Witness: All right, now?

The Court: Yes.

The Witness: Well, thereafter and due to a good many prior happenings along this nature, as to stumpage, inasmuch as I had no knowledge of anything of the kind of Mr. Wilson's contracts with Ward or with Sage or anybody else by his—by his own admission at that time when he told me, he says, "We don't owe any stumpage there," I assumed that he meant that on other lands wherever

(Testimony of Paul C. Owens.)

Union might be logging, I didn't know, and I was busy and he was busy and it just wasn't brought up again.

Q. What did you do? What records were you then keeping for Union?

A. Well, I was keeping their log haul records and their log sale records.

Q. What is a log haul record?

A. A log haul record is a record where—which is maintained whereby each driver is given credit for their load, for every load of logs he hauls out.

Q. What other records were kept? [212]

A. We kept a log sales record.

Q. What is a log sales record?

A. A log sales record is a record of where each load of logs where it is delivered and by whom it has been logged.

Q. All right. What other records did you keep?

A. The other record was a contract logger record.

Q. Did you have anything to do at any time with the keeping of any stumpage records at Union Bond and Trust Company?

A. No, I didn't see any need for it, and I was—as far as I was concerned, my job primarily in the Arcata territory was as outlined by Mr. Herdon. I was to pay the bills, pay the truckers, and pay the loggers and the balance of the work, which, as in the past, Union Bond—any records of their stumpage,

(Testimony of Paul C. Owens.)

their contracts or anything was always kept in Portland, to the best of my knowledge.

The Court: Did you pay the bills for stumpage?

The Witness: I did not.

The Court: In the Coast Redwood Company?

The Witness: No.

The Court: Who tended to that?

The Witness: The figures I gave, your Honor.

The Court: You keep the figures for the Coast Redwood Company?

The Witness: Oh, yes, I always have.

The Court: But not in the other? [213]

The Witness: No, this was the first time I had ever been affiliated with Union Bond.

The Court: Go ahead, Mr. Phelps.

Mr. Rank: I wonder, may I interrupt just a moment? I would like to have the Reporter read back the last two answers.

The Court: Certainly.

(The Reporter read from the record.)

Q. (By Mr. Phelps): Now with respect to the tickets, these log scale slips, during that period of time, for Union Bond and Trust Company, what to your knowledge was done with them? Did you have anything to do with them after you posted the three records that you told us about?

A. Well, the white copies were then sent to Portland, and the pink were held in the office because at the time I had this——

Q. What office?

(Testimony of Paul C. Owens.)

A. At the Coast Redwood Company. At the time of our——

Mr. Rank: I don't think you were asked the reason for that.

The Court: No.

The Witness: All right.

The Court: How about the third copy?

The Witness: Well, we only had two copies there.

The Court: You only had two?

The Witness: Yes. [214]

The Court: All right.

Q. (By Mr. Phelps): With respect to the pink slips, you started to explain and Mr. Rank interrupted you. What was your explanation then?

A. Well, the explanation I was going to give, it dates back to the first conversation I had with Mr. Wilson, as to what I was to do with any tickets of Union Bond, and at that time I was told—he just said, “Well, keep them, file them, and,” he said, “If I need them or they are needed by the Portland Office, we will let you know.” And that was the last I heard of it.

Q. What reports were you sending on to Mr. Ward in Orchard Lake, Michigan? Did you have anything to do with that?

A. Yes; in fact, I started that—that type of report. We were sending a recap every month of every ticket. This recap showed by number of the ticket and the footage, whether it was redwood or fir by species. That was a typewritten report sent out

(Testimony of Paul C. Owens.)

monthly either at the time of the mailing of the slips or subsequently thereto. That report was started in 1949 and continued on and is still in effect. [215]

Q. All right. And now when did you make those reports to Mr. Ward?

A. Well, during the time up until this shut-down period they were made fairly regular every month as near to the 20th of the month as I could. Thereafter, for the first few months after, after March 25th, '53, my help was cut down to one woman, and subsequently we were slow in getting them out, at that particular time, although from there on we always tried to get them out to the best of our ability by the 20th of the following month.

Q. And when were the pink slips sent?

A. The pink slips were sent either at that time or earlier.

Q. During that time you mentioned something about being short of help or something. Tell me about that?

A. After this shut-down and at the time I took on this contract with the court I had one woman in the office with me working. We subsequently had some seven or eight people working in the office for which the court would not allow us overhead, so consequently we had to do the best we were able to do.

Q. Was that the general arrangement then under which you were operating from April of 1953, on through the remainder of the calendar year of 1953?

A. I believe it was, Mr. Phelps. It was either

(Testimony of Paul C. Owens.)

the end of that year or the first part of 1954 that I got some help; I don't [216] know just when it was.

Q. My question was with respect to the general routine and procedure with respect to both Coast Redwood and Union. Is that the general procedure through the calendar year '53?

A. Yes, it was, yes.

Q. All right. Did you ever have a request from Mr. French or anyone representing Mr. French prior to—well, let's fix the date, Mr. Rank, that date that Mr. French came to you, Mr. Owens, February 20th or 21st?

Mr. Rank: I think it was the 21st.

Mr. Phelps: Let's use that as the date in any event.

Mr. Rank: Yes.

Q. (By Mr. Phelps): Now fix in your mind, if you will, a time and occasion on February 20th or 21st, the time when Mr. French came to see you to request certain information. Do you recall the occasion? A. Yes, yes, I do, yes.

Q. Prior to that occasion during the calendar year '53, did Mr. French or anyone representing Mr. French ever come to you and request any information or the right to examine any records?

A. No, none.

Q. All right. Now on that occasion when he did come to see you, Mr. Owens, how did that happen? Was it by appointment or how was that?

A. No. As I recall the first event there was Mr.

(Testimony of Paul C. Owens.)

Fletcher [217] called me from Oakland and requested—asked me if I would show Mr. French any records or if I wouldn't, and I told him I would be glad to.

Q. All right. And then did you get in touch with Mr. French?

A. Yes, I did. I called him at Fortuna. I don't at this time recall if I talked to him there or whether he got the message, but anyway he was in subsequent to that.

Q. And made an appointment?

A. That's right.

Q. That was the effect of the conversation?

A. That's right.

Q. He kept the appointment on February 20th or 21st. Will you tell us as best you can your memory of what that conversation between you and Mr. French was on that occasion? What was said? What did he ask you for and what was your reply?

A. Well, as I recall, to the best of my knowledge Mr. French was asking for the similar records that he and Mr. Fleckner had seen at the Coast Redwood mill.

Q. What were they?

A. They are our stumpage records.

Q. Were they kept in a book?

A. That's right, in a ledger. And at that time I told Mr. French that I didn't have it, and that as far as I knew, they were maintained in Portland and that either he could make some arrangements to

(Testimony of Paul C. Owens.)

go to Portland or I could make some [218] arrangements to have them brought down.

Q. What else did he say to you on that occasion?

A. Well, the only other thing was he was going to come back the following week some time, as this was toward the end of the week; I don't know the exact day it was, Thursday or Friday, somewhere around there, and he was coming in the following week and we were to work out something.

Q. You were going to work out something to see these——

A. That's right, to see the records.

Q. In that conversation will you state whether or not he said anything about a discrepancy between the amounts reported, or did he say anything to you about that?

A. No, I don't recall anything of that kind. It was a very short conversation. It was right at 5 o'clock; in fact, my help was just leaving just as he walked in, and that was as far as the conversation went.

Q. Thereafter did he ever come back and see you as he had arranged to check on those records?

A. No, he did not.

Q. Neither to arrange to have them brought down or to arrange to go to Portland?

A. No, he did not.

Q. Did he ever come back to you to talk to you about the matter? A. No, he did not. [219]

Q. Now, you have been under subpoena from the

(Testimony of Paul C. Owens.)

defendant, have you not? A. That is correct.

Q. That subpoena called upon you to produce certain records, and I take it that you have with you those books and records kept by you with respect to Union Bond and Trust? A. They are.

Q. They are in the back of the courtroom available for Mr. Rank if he wishes to examine them?

A. They are.

Q. Are those the only records that you kept relating to the Union Bond and Trust Company?

A. Those are the only permanent records, yes.

Q. One other thing. There has been referred to and will be referred to some reports which have been described as the Elliot log haul reports. What were they, please? What were those reports?

First of all, who was Mr. Elliott?

A. He was a scaler working for Coast Redwood Company.

Q. In the woods? A. In the woods.

Q. He was the man who was making out the tickets, is that right? A. That is correct.

Q. In addition to those tickets, did he take down to your [220] office a log haul report?

A. He did.

Q. What information did that show on it?

A. His log haul showed every day a complete list of all tickets. It showed who the trucker was and it showed the footage, it designated as to whether it was redwood or fir, and it also showed where each load went and the mill, and at the bottom it gave a

(Testimony of Paul C. Owens.)

recap showing logs to date, week to date, total, and month to date total, and it was carried forward each day for the month.

Q. With respect to the Elliott log haul report, where would that be sent?

A. Well, up until this arrangement that I had——

Q. First of all, from Mr. Elliott where would it go? Let us trace it? A. To my office.

Q. To your office?

A. No, not to my office. It would go to the Coast Redwood office normally.

Q. After you entered into this arrangement with creditors—the arrangement I am talking about with the creditors would be in March or April, 1953——

A. April.

Q. All right, after that what happened to those Elliott reports? What did you do when you received them in the office? [221] What use did you make of them?

A. I kept them in the office for reference.

Q. What use did you make of them?

A. Well, during the month if there should be a time—there was several times when there would be a whole day's tickets that we would not get for a couple of days. Some trucker would have them in his box and wouldn't bring them by. So we could at least tell where the logs went and the footage off Elliott's sheet all during the month. And it was also kept as a check against our own records. Mr. Elliott was the man in the woods, but he was very ac-

(Testimony of Paul C. Owens.)

curate. At the end of each month, when we no longer had any use for them, they were burned.

Q. After that period of time, they were not sent on to Mr. Wilson, is that right?

A. No, I kept them.

Q. You mentioned that these tickets had numbers on them? A. That is correct.

Q. Was there a separate series of numbers for Ward and a separate series of numbers for Sage?

A. Yes, yes, there was.

Q. Was there a separate series of numbers for different loggers, or was that not the case?

A. No, a separate series was for each road.

Q. For each road? [222] A. Yes, sir.

Q. So it would be a separate series first which would show the road, and then that would be broken down into two sub-series as to Ward or Sage, is that right? A. That is correct.

Q. The ticket numbers were shown on these—what did you call this, a reconciliation?

A. That is right, on our reconciliation.

Q. That you sent to Ward?

A. That is correct.

Q. That would be for Coast?

A. That is correct.

Q. In addition to that I noticed in these records—and I don't believe you have seen this; this is Plaintiff's Exhibit 8 in the French Deposition, for Identification—I have noticed ticket numbers and yellow sheets; that is what you have referred

(Testimony of Paul C. Owens.)

to, when they had ticket numbers such as that (indicating)? A. That is correct.

Mr. Phelps: You may cross-examine.

Cross-Examination

By Mr. Rank:

Q. Mr. Owens, will you get the records that you brought in response to the subpoena, please?

A. Yes. [223]

The Court: Have you examined any of these before, Counsel?

Mr. Rank: I would like to examine them now, if the Court please.

The Court: You cannot convert the trial into a discovery proceeding.

Mr. Rank: If the Court please, I am not going to spend any time examining them now. I just want to identify them.

The Witness: There is the log haul reports.

(Handing a book to Mr. Rank.)

Q. (By Mr. Rank): This looseleaf volume that you hand me, as I understand, is the only record that you brought in response to the subpoena?

A. No, I have other records here.

Q. Oh, I did not know.

A. That is the log sales and that is the contract loggers (handing two additional books).

Mr. Phelps: What was the first one?

Mr. Rank: Let us identify them by name. The

(Testimony of Paul C. Owens.)

first volume handed me is the log haul book, is that correct?

The Witness: That is correct.

Mr. Rank: For identification purposes, may we mark that Defendant's Exhibit next in order. Mark it for identification. We suggested a little while ago that we follow the exhibits in the pre-trial. This will then be P. [224]

(The book referred to was thereupon marked Defendant's Exhibit P for Identification only.)

Q. (By Mr. Rank): Can you explain generally, Mr. Owens, what this book contains?

A. That book contains the list of every ticket that was hauled by Union Bond and Trust Company, and it is used primarily for the payment to our log truckers.

Q. Does it contain a record of the quantities of logs removed from the properties?

A. It does, and it is broken down by redwood and fir.

Q. Would it show in here the records by landings and by the loggers themselves?

A. That book there would not show by the loggers. Yes, it would, too. I take that back. It would.

Q. This post book that I have, what do you call that? A. That is the contract loggers.

Q. Generally what does this book contain, what information?

A. The information is put down in a recapped

(Testimony of Paul C. Owens.)

form, so that we pay our loggers each period. The scale is broken down as to wood scale and net scale, from which they are paid, net scale, from which they are paid, net scale.

Mr. Rank: May this be marked Defendant's Exhibit next in order for identification?

(The volume referred to was thereupon marked [225] Defendant's Exhibit Q for Identification only.)

The Witness: That is the log sales.

Q. (By Mr. Rank): Generally speaking, what information does this book of log sales contain?

A. That contains where the logs went, to what mill, what the scale was, and how much the mills paid as to scale. That gives you a breakdown, the gross and net scale.

Mr. Rank: I ask that that be marked.

(Whereupon, the volume referred to was marked Defendant's Exhibit R for Identification only.)

Q. (By Mr. Rank): Not being a bookkeeper, Mr. Owens, do any of these documents contain the information as to the stumpage for the Ward property?

A. You could work it out, yes. You could work it out from these books.

Q. In other words, it would be a matter of going through the books and making computations?

(Testimony of Paul C. Owens.)

A. There would not be too much computations to make. It is broken down in there.

Q. These are the—all the books that you maintained for Union Bond and Trust?

A. That is correct.

Q. Now, what different type of book did you maintain for the [226] Coast Redwood?

A. The Coast Redwood?

Q. Yes.

A. Well, there is a good number of books that are kept.

Q. Let me shorten this. Insofar as the stumpage records were concerned?

A. Well, just one more book showing the breakdown by sections and settings, settings and sections.

Q. That was the book from which you made your monthly recaps?

A. That is correct. It was typed from that book.

Q. And you did not keep that book for Union Bond and Trust Company? A. No.

Q. How long were you employed by any of the Wilson companies, Mr. Owens? When did you start? A. I believe in 1947.

Q. And where did you start?

A. At Compton.

Q. How long were you at Compton?

A. Until the early part of 1948 or the spring of 1948.

Q. What was your position or job there?

A. As accountant.

Q. And then you moved to Eureka or Arcata?

(Testimony of Paul C. Owens.)

A. That is correct.

Q. And went with the Coast Redwood Company? [227] A. At Klamath.

Q. Mr. Wilson was President of the Coast Redwood Company? A. Insofar as I know.

Q. You have seen his signature as President many, many times, have you not?

A. That is correct.

Q. And he was also President of the A. P. Wilson Lumber Company?

A. That is right, from the same information.

Q. And also President of Union Bond and Trust? A. That is correct.

Q. When you first went to Coast Redwood, what were your duties?

A. Well, when I first went up there, right at the start, I was hired there as an accountant, more or less along the same lines.

Q. Were you Office Manager when you first went there? A. No, I was not in a true sense.

Q. When did you become office manager?

A. Oh, within, I would say, two months, two months' time.

Q. Are you an officer of either Coast Redwood or Union Bond and Trust Company?

A. Not that I know of.

Q. I show you a letter, Mr. Owens, taken from a folder handed me by counsel, a letter dated February 28th, 1953, on the letterhead [228] of the Union Bond and Trust Company from Mr. Wilson to Coast Redwood, Attention Mr. Paul C. Owens,

(Testimony of Paul C. Owens.)

Vice President. A. That is unbeknown to me.

Q. For all you know, you may be Vice President if the President called you that, but you do not know about that? A. That is correct.

Q. And the same is true with respect to the Union Bond and Trust Company?

A. Oh, I see that is just the letter. That is right. I have never seen any correspondence on Union Bond though like that.

Q. Who is your immediate superior while you were working for Coast Redwood during the entire time after you became Office Manager?

A. Well, there was a time there when Mr. Bready was the General Superintendent, up until the sale of the mill in 1948, in the fall, so he was at that particular time.

Q. You mean the General Superintendent of the mill operation itself? A. Well, in the office.

Q. Then the sale was made to Hull, and then what did you do? A. I stayed with Hull.

Q. You stayed with Hull?

A. I stayed along with Mr. Hull, that is correct.

Q. And you continued with Mr. Hull until Mr. Wilson took the [229] property back?

A. That is correct.

Q. And you then stayed with Coast Redwood continuously until the present time, except for the arrangement with the creditors?

A. That is correct.

Q. During the last year and a half from whom have you taken your orders?

(Testimony of Paul C. Owens.)

A. Well, for the last year and a half I would say it would be primarily—I mean speaking of orders, from the auditors or from Mr. Wilson. The auditors have set about certain things that they wanted insofar as Union Bond and as far as the Coast Redwood; my orders have come from the Court or the Court representatives, and Mr. Wilson as Debtor in Possession.

Q. You stated that the Union Bond logging operations commenced in Section 16 in about April, 1953?

A. I believe that is correct.

Q. The Union Bond and Trust Company had not conducted any logging operations before that to your knowledge?

A. Not known to me, no, never.

Q. In fact, to your knowledge, had Union Bond and Trust Company conducted any type of business operation?

A. Well, that I do not know.

Q. I mean within your knowledge?

A. Not within my knowledge, no.

Q. When the arrangement was made with the creditors, and [230] for the creditors, you continued receiving information from the woods at the Coast Redwood Office?

A. Most of the time, yes.

Q. Your direct information from the woods as to the quantity of logs is these scale slips to which you have referred?

A. That is correct.

Q. As I understand, they would come in usually daily for the previous day's operation?

A. That is right.

(Testimony of Paul C. Owens.)

Q. They would come in from Mr. Elliott, both the yellow, the white and the pink slips?

A. Well, you didn't always get the pink copy every day, no.

Q. That had to wait sometimes for the trucker to bring it back, until it may be a day or so late?

A. That is right, or a month.

Q. How many times has it been a month late, Mr. Owens?

A. Oh, I would say that there are probably fifteen tickets every month that you never get.

Q. Other than that, when do they come?

A. Anywhere from a day to a month, as I say. Sometimes our truckers do not even bring them in until the end of the month.

Q. When you receive the pink and the white slips—I am referring now to the Coast Redwood—what was done with them first? First of all, how did they come in? In what fashion? [231]

A. The tickets came in in an envelope. Are you speaking of Coast Redwood?

Q. I am talking about the Coast Redwood office.

A. The tickets came in in an envelope marked "Coast Redwood" into the office. They were brought there in the evenings.

Q. Both pink and white in this envelope?

A. That is correct, and along with that the log haul recap that was made by Ken Elliott. That was the normal procedure. Sometimes they were dropped off in my Arcata office, and the following day they would be picked up and brought out to the

(Testimony of Paul C. Owens.)

mill. Do you want me to follow through with this procedure of handling these tickets?

Q. Yes, you can follow the procedure so far as the slips are concerned.

A. As far as the slips are concerned, then, they were taken to the mill and sorted, the whites from the pinks. The pinks were placed on clip boards, each series on a separate board. The board was kept up for the entire month and filed on the board. The white copies were placed—we have a pigeon-hole affair. It is a big shelf affair with little holes, and over each shelf is the name of a party whose stuff is put in that box for them. The Coast Redwood tickets, white copies only—we had a little clip, and each day they were all put together and placed in a certain box. The pinks were then placed on our clip boards. The Union Bond tickets also; the [232] same story was on them.

Q. In other words, did the Union Bond tickets go to the Coast Redwood office?

A. They did part of the time, by the same token as Coast.

Q. And part of the time to your office?

A. That is correct.

Q. Proceed.

A. Then our procedure was that—well, there was a time there that I was doing it myself at the mill, with Union Bond, entering in the books myself, and then later on, as I had more help that was able to do it, the white copies were taken to my office either every day or every two or three days, when-

(Testimony of Paul C. Owens.)

ever it happened to be convenient for somebody, if he was going to town, and the Coast stayed there at the mill, and were entered at the mill.

Q. Then when the white copies were entered—and I am referring now to the Coast Redwood slips—when the Coast Redwood white slips were entered, the information from them was entered into the books, what was done with those slips?

A. With the white copies?

Q. Yes, of Coast Redwood.

A. When they were all entered?

Q. Yes, after you were through entering them in the stumpage record.

A. Yes. The bundle was marked and put back on file. [233]

Q. They were kept there and not sent on to Portland? A. Oh, no.

Q. What happened to the pink of Coast Redwood?

A. The pink for Ward goes to Ward at Orchard Lake.

Q. What would you do with them first before you sent them to Ward?

A. After the end of each month we would allow some 10 or 15 days for all of our pinks that were outstanding to see if they would eventually come in. If they did not, within a given time, we would pull the white slip, take them to town, have them photostated, and put them in the proper order in the bundle. The tickets were bundled up, the pinks and photostatic copies, and mailed to Orchard Lake.

(Testimony of Paul C. Owens.)

Q. And then what?

A. Mailed to Orchard Lake.

Q. To the Wards at Blue Creek, Orchard Lake?

A. That is correct.

Q. Let us go on with the procedure so far as the Union Bond & Trust Company scale tickets were concerned, and I am referring now to the period from, say, June of 1953, on through the year.

A. Well, the pinks——

Q. The whites and the pinks. How did you get them, from whom did you get them, and what did you do with them?

A. The pinks came to the mill the same as the others did, except as I say, when they were dropped into my office and [234] had to be relayed out there. But after our pinks were in the mill there, at the close of each month, during I believe practically all of 1953 there was no emphasis placed on missing pink tickets. We did not deem it necessary because we were going to keep them in the vault or file them. We just kept them. We tied them up together and had a little slip where there was one missing. But we did not have any photostatic copies made because we did not see any need for it, and they were all filed in the back office.

Q. In the back office at the mill?

A. That is correct.

Q. Did you file them, or were they filed under your instruction or direction?

A. That is right. Somebody filed them.

Q. You knew where they were?

(Testimony of Paul C. Owens.)

A. The pinks, yes.

Q. What about the white copies?

A. The whites periodically were mailed to Portland.

Q. First of all, were they sent up to your office?

A. The whites?

Q. Yes. A. Oh, yes.

Q. What did you do with them at your office?

A. The girl in my office, after she started entering work, she would enter them in the three books that you have there. [235] That would be the normal procedure for her. Then she would place them in a cubbyhole at the end of each period or half, and at the end of each month or thereabouts I would pick them up, or even a couple of months sometimes would accumulate there, and I wouldn't do anything with them.

Q. When you picked them up what did you do with them? A. They were normally mailed.

Q. To where? A. To the Portland office.

Q. To the Portland office of the Union Bond & Trust Company?

A. That is right, at 1101 South Fifth.

Q. Let me see if I get the difference between the records that you kept for Coast Redwood and Union Bond & Trust Company. In the Coast Redwood records, in the so-called stumpage book, you had pages daily showing the scale slip number, the quantity on the slip, the property from which the logs came, the section, and the logger that did the logging?

(Testimony of Paul C. Owens.)

A. I don't know whether it had—let's see—no, there is nothing about who logged it on there, no.

Q. Then what information was there?

A. It had everything but that.

Q. Everything but that? A. That is right.

Q. So as far as Coast Redwood was concerned, assuming the girl had performed her duties and made the entries in the [236] morning, you could open that book today, for example, and read off the quantity of logs that had been received the day before, could you not? A. In the stumpage?

Q. Yes.

A. That was not maintained daily, no. The place where I would get that would be out of our log haul book. That was maintained daily.

Q. What did you use the stumpage book for in Coast Redwood?

A. Well, the only use we had for it for years was for making up these recaps. At one time they didn't have a regular ledger. They were kept on work sheets. Work sheets are lost in the shuffle, and so forth, and so I started to keep them in the ledger. The only purpose I had in mind was for maintaining a permanent record that we could always have on file, and for typing up these reports it is a lot easier if you had a book to type from. That was the only purpose.

Q. And also it would be easier for you to get information as to the quantity of logs removed for any particular period, whether it was a two-week period, a month period or a day?

(Testimony of Paul C. Owens.)

A. It was not needed for that, no. We had other records for that. It served no purpose for that. Other than for a stumpage analysis they served no other purpose.

Q. Why didn't you keep that type of record for Union Bond & Trust Company? [237]

A. Well, so I stated, because right off the bat I didn't figure it would ever be necessary and I was not told to. After my talks with Herdon—and if I was going to send records to Portland, and I had no knowledge in any way, shape or form as to their relationship with any timber. I still do not have.

Q. What information did you send to Portland periodically, Mr. Owens, other than these white tickets?

A. Oh, cancelled checks, check copies, deposit copies of monies that we received from mills for logs, and various other information, correspondence, bills.

Q. Information as to the money received from the sale of logs? A. Oh, yes.

Q. Information as to the money received from Coast Redwood, Company for the five dollar a thousand stumpage? A. That is right.

The Court: What was that last? I didn't understand that.

Mr. Rank: That has not come out as yet, if the Court please.

Q. Under the arrangement between Union Bond and Trust and Coast Redwood, during the time the Creditors Committee was logging—let me put the

(Testimony of Paul C. Owens.)

question this way. What was the arrangement insofar as the payment of stumpage by Coast Redwood to Union Bond & Trust? [238]

A. Well, they were to pay five dollars a thousand for all logs except those going to Arrow Mills or California Barrel, as I recall.

Q. In other words, Coast Redwood was to pay the Union Bond & Trust five dollars a thousand for all logs removed from the Ward lands?

A. Well, Ward and Sage.

Q. We are just dealing with the Ward lands here, Mr. Owens.

A. That is right.

Q. How was that payment made?

A. Well, it was made every week.

Q. By whom?

A. Well, it was made by Coast Redwood Company by check.

Q. Who drew the check?

A. There were two of us. There were two people on the checks of Coast Redwood Company. There were three members of the Creditors Committee in Eureka and two of them had authorization to sign a check with me, and then myself and one of their two signed the check.

Q. Who drew the checks?

A. Well, the checks were all drawn at the office.

Q. All drawn at your office and by you, weren't they?

A. No, they were drawn at the office of Coast Redwood.

Q. Under your instructions or your directions?

(Testimony of Paul C. Owens.)

A. That was under the direction of the court order. [239]

Q. But you were in charge of the Coast Redwood office, were you not, Mr. Owens?

A. Oh, yes.

Q. Let us not quibble about this.

A. That is right, yes.

Q. Then to whom was the check delivered?

A. It was delivered to Union Bond & Trust Company.

Q. To whom for Union Bond & Trust Company?

A. Well, it was picked up sometimes by somebody—possibly there was two or three people that did banking for Union Bond & Trust Company. It might have been banked by any one of them. I might have banked it, Mr. William Charles might have banked it, or one of my girls may have banked it.

Q. In other words, it was either picked up by you or by somebody employed by you or working with you?

A. That is right.

Q. Then what was done with the check?

A. It was deposited in the bank account of the Union Bond & Trust Company.

Q. In the Bank of America at Arcata?

A. That is correct.

Q. And that was done weekly?

A. That is right, that is correct. [240]

Mr. Rank: We are going into that matter further further on, if the Court please, the paying

(Testimony of Paul C. Owens.)

of the Coast Redwood and the money to Union Bond and Trust Company for those logs.

The Court: Did you have anything to do with the payment of the account of the Union Bond & Trust Company?

A. You mean paying out funds?

Q. Yes.

A. Well, yes, I paid funds out under orders of Mr. Wilson or for current bills which I was authorized to pay.

Q. Did you pay the account of Union Bond & Trust Company to Ward?

A. No, no, I had nothing to do with that.

Q. That wasn't handled by you? A. No.

Q. (By Mr. Rank): Mr. Owens, you say you had nothing to do with that. You did have something to do with it. A. Not as far as paying.

Q. As far as paying, arranging to pay or transferring money for that purpose?

A. For that purpose I say no; I never knew for what purpose any money was transferred.

Q. Mr. Owens, it is your testimony that at no time did you, either before or after discussion with Mr. Wilson, transfer specific amounts of money over to either the Union Bond & Trust account at Portland or the Union Bond & Trust account [241] at Los Angeles for the purpose of paying Ward stumpage?

A. A specific amount for stumpage?

Q. Yes, or any amount. Let's find out what you did.

(Testimony of Paul C. Owens.)

A. Well, there was money transferred, Mr. Rank, but to my knowledge I never was advised as to when a stumpage payment was to be made.

Q. That is your testimony now, is it, Mr. Owens?

A. As far as I know, yes.

Q. And you never discussed with Mr. Wilson how much money was to be paid to the Wards for any particular month? A. Oh, yes, I did.

Q. And then transferred that money to the Los Angeles account or the Portland account for payment?

A. There was money transferred, Mr. Rank, but I don't know for what usage it was to be put. I had no knowledge, I never questioned Mr. Wilson, when he wanted money transferred, what use it was being put to. I never questioned him. It wasn't my business.

Q. Now, Mr. Owens, did you in addition, or maybe it is in these records right here, keep such records as the total volume of sales of logs by month; in other words, the dollar value which you received?

A. There is no dollar value there, no.

Q. In other words, there is no information in these books? A. No. [242]

Q. As to the total amount that Union Bond & Trust received during any of these months for logs sold?

A. No, that would have to be taken off your slips, at the mill.

Q. But you didn't keep any record?

(Testimony of Paul C. Owens.)

A. There is no dollar value there; there is the footage volume there.

Q. I wonder if you would show me that footage value by month?

A. Yes. That isn't totaled by the month there, but there is a total for each half month, and you can get a total. There is the total redwood and fir for that half. That is the way it is right through the book.

Q. While you are down here, do any of these books have any information as to the total deposits in the bank?

A. No, no, there is no cash book.

Q. Do any of these books have any information as to who the checks were drawn to? A. No.

Q. You didn't keep any such? A. No.

Q. No information of that type?

A. During the month I did, Mr. Rank, such as a report like Mr. Elliott would be using, but only for the purpose of maintaining a balance in the bank, and not as an original book, which I had no responsibility for keeping. [243]

Q. Did you keep a list of checks which were drawn against the account, and keep it as a permanent record? A. No.

Mr. Rank: Shall we take the recess?

(Short recess.)

Q. (By Mr. Rank): I believe you testified, Mr. Owens, that in April of 1953, when Union Bond & Trust Company started logging, that you began re-

(Testimony of Paul C. Owens.)

ceiving scale slips for Union Bond & Trust logging, marked Section 16? A. That's right.

Q. And you say those slips had a "W" on them?

A. I said I thought they did, Mr. Rank; I am not sure of that.

Q. And then did you receive any additional scale slips, with notations other than Section 16?

A. I don't recall. I just happened to know that they were logging in 16. At that particular time, it was something new to me.

Q. Did you subsequently, in the next month or two, notice they were logging someplace else?

A. Oh, it was a couple of months, I guess, after that.

Q. Where did you notice they were logging?

A. Well, I believe it was—let's see—it must have been 32, I think.

Q. Where was that? What property was that?

A. That was Ward property also. [244]

Q. Section 18? A. No, 32.

Q. Did they log Section 18 also?

A. Well, I believe they did, much later on.

Q. When you received these first slips of Section 16, as I understand they went to your office first, the white slips, or did they?

A. No. Those came to the office of the mill at first, because I was doing the work there, at that time.

Q. But then subsequently, or later on, they started coming to your office?

A. Well, periodically; but there was never—it

(Testimony of Paul C. Owens.)

was never something that was done every day; no.

The Court: I will have to interrupt you there. I haven't quite got the distinction that you are making there. Didn't the Union Bond log the same property that the Coast Company had logged?

The Witness: At the start of this; no. No; it was all new property to me.

Q. (By Mr. Rank): Well, for the first month or two, when you say you saw the slips with Section 16 on them, they were then logging——

A. I don't think it is on the map.

Q. Not on that map? A. No. [245]

Q. Then, however, you began receiving slips showing different section numbers; is that correct?

A. Yes; I believe they probably had them on there. I don't recollect, offhand.

The Court: Did those slips cover areas where Coast Redwood was also logging?

The Witness: Where they were logging?

The Court: At that time; yes.

The Witness: Not in the same area.

Q. (By Mr. Rank): What do you mean, in the same area?

A. They weren't logging on Sage lands—the Union and Coast weren't logging off the same land.

Q. Would you say—for example, Section 30 is Ward property. Did you see any slips for Section 30?

A. Probably some came in later on; yes. Right now I wouldn't say whether they actually did, although I believe they did.

(Testimony of Paul C. Owens.)

The Court: What has confused me, counsel, is that I understood, from the statement of the attorney, that the Union took over logging operations at some time because of the involvement of the Coast Company. Isn't that right?

Mr. Phelps: That was later; towards the end of June, I believe.

Mr. Rank: They both continued logging.

The Court: At some time towards the middle of 1953——

Q. (By Mr. Rank): They were both logging; is that correct? [246] A. That's right.

Q. They were both logging Sage and Ward properties?

A. That is correct. They were both logging in April, as far as that is concerned.

Q. But in April, according to your testimony, Union wasn't logging in any of this property covered by this agreement shown on the map here?

A. No; I don't think they were.

Q. It wasn't until the first of July that they commenced logging in any of this property, as shown on the map?

A. I wouldn't say without looking——

The Court: Is that correct?

Mr. Phelps: Yes, your Honor; late in June, they commenced.

Mr. Rank: Two or three days in June, and then from then on.

The Court: That is what I understood counsel to have said.

(Testimony of Paul C. Owens.)

Q. (By Mr. Rank): When these slips went to your office, in which of these books, would entries be made from the slips?

A. Oh, yes; in the log haul book, and the log sales book.

Q. These two books here? A. That's right.

Q. And those are the only books in which entries would be made from those slips? A. Yes.

Q. Is there any entry in here which shows Section 18 or [247] Section 32?

A. No; there is not.

Q. You kept notebooks of records showing that?

A. No.

Q. No entries showing in the books that any particular logger worked in Section 18 or Section 32?

A. No.

Q. You kept no permanent record of that?

A. No.

Q. I believe you testified that you have no cash book and no records of cash deposits or cash receipts or anything else?

A. No. Because they are all sent to Portland, to go in their permanent records.

Q. And the record of the receipts of the Union Bond & Trust Company, for monies received from Coast Redwood for Ward stumpage; what records did you keep, with regard to that?

A. Well, actually none. The only thing that was done there, is that a deposit tag was made out, and on the face of the duplicate tag, it was marked,

(Testimony of Paul C. Owens.)

“Coast stumpage,” and that was sent to Portland. That was as far as I went, inasmuch as I maintained no records as to stumpage or depletion there. [248]

Q. Now, when you started receiving scale slips, showing Sections 18, 32 and 30, did you know they were from Ward property, covered by this agreement? Did anybody call that to your attention?

A. I didn't know that, Mr. Rank.

Q. You didn't know that?

A. No, sir. I have no knowledge as to whether that agreement, or any agreement, covers as to stumpage, what stumpage.

Q. When you received the scale slips at Coast Redwood for both Sage and Ward lands, how did you distinguish them?

A. One was marked with a “W” and one with an “S.”

Q. And also with the Section number from which the logs came; is that correct?

A. That is correct.

Q. When you received slips with the same information for Union Bond and Trust Company, and you saw where it referred to the same sections that you saw for Coast Redwood, what did you think?

A. The same sections?

Q. Yes.

A. I didn't pay any attention to that. As a matter of fact, I wasn't entering Coast and Union on

(Testimony of Paul C. Owens.)

them myself, so I wouldn't have had occasion to see it.

Q. What was the occasion, when you had this conversation with Mr. Wilson, in which he told you what to do with these section [249] 16 slips?

A. What was the occasion?

Q. Yes; did you phone him, or did he phone you?

A. No; I believe I phoned him probably. Because in the past, it has always been our understanding with Mr. Wilson to try to get the tickets out by the 20th of the following month. So, inasmuch as they started up there in April, presumably, I would have called Mr. Wilson some time the middle of May, and asked him what to do with them.

Q. And he told you what?

A. At that time, he told me that Union owed no stumpage. He says, "Just file them." He says, "Some future time, I may want them," or words to that effect—which I did.

Q. But you knew this was the Ward property?

A. I assumed it was.

Q. Did you have any further conversation with him in that regard?

A. No; I had no occasion to.

Q. Did you have any conversation with Mr. Wilson during the balance of 1953, concerning this matter? I am referring now to the reporting that was being done of Ward logs removed by Union Bond and Trust Company.

A. I don't believe so. No.

Q. When you saw the scale slips coming in from Section 32, which was the same Section for which

(Testimony of Paul C. Owens.)

you were paying for, for [250] Coast Redwood, did you call that to Mr. Wilson's attention?

A. No; because I had no occasion to even notice it, Mr. Rank.

Q. When you prepared the monthly recap for Coast Redwood, your testimony is that you tried to get it out as close as you possibly could to the 20th of the following month? A. That is right.

Q. And you sent one copy to Ward and one copy to Wilson or Union Bond and Trust?

A. That I am not sure of during this period of time you are referring to. It is more or less like the old days when Mr. Wilson got the log haul recaps; whether they were mailed out promptly, I couldn't say.

Q. And did you prepare any recap of the Union Bond and Trust Company logs?

A. No. I never have.

Q. Why not?

A. Because that goes back to the very start of this thing; and as far as I was concerned, I didn't have to.

Q. Did you have any records there from which you could have prepared a log-haul recap?

A. No.

Q. Do you recall when Mr. Fletcher telephoned you and called your attention to the fact that there might be a discrepancy in the report for the month of October? [251]

A. I don't know whether he said that or not. He said he wanted Mr. French—I believe he wanted

(Testimony of Paul C. Owens.)

Mr. French to come over and see the records. Whether he said anything about a discrepancy or not, I don't know, Mr. Rank.

Q. Our records show here, Mr. Owens, to refresh your memory, that that phone call was on February 11. Would you say that that is approximately the time as far as you are concerned?

Mr. Phelps: What record is this?

Mr. Rank: The letter that Mr. Fletcher wrote to Mr. French, in which the postscript was added:

"I just got through talking to Mr. Owens."

Mr. Phelps: I didn't notice that. It doesn't matter. If you state that is a fact, that is good enough for me.

Q. (By Mr. Rank): Calling your attention, Mr. Owens, to a postscript of Mr. Fletcher's letter to Mr. French, in which he states as follows:

"Under date of February 11, 1954, I was just able to contact Paul Owens at his office in Arcata. He states that he has a copy of the statements and logging slips for the month of October."

and so forth. Would you say that that is about the date that he called you?

A. Well, I couldn't say right offhand.

Q. Approximately around that time, is that it?

A. It probably was, as far as I know. [252]

Q. As far as your recollection goes; that is right?

A. Yes. I don't even recall it at all, hardly.

(Testimony of Paul C. Owens.)

Q. After that phone call from Mr. Fletcher, did you talk to Mr. Wilson, either personally or by telephone?

A. I probably did. During that period and for some time we maintained a very good deal of telephone conversation. I probably did.

Q. Did you report to him the fact that Mr. Fletcher called you?

A. Well, I would presume I did. Now, I wouldn't say for sure.

Q. And what is your recollection as to what you told him?

A. Well, as I recall, I told him that he called and wanted Mr. French, who was the local representative of theirs—he wanted to come over to see the records. As far as I was concerned—I asked him—I believe I did ask him, as far as he was concerned, if there was anything wrong with it.

He said, "No."

Q. He told you to go ahead and let Mr. French see the records? A. Yes.

Q. Union Bond and Trust Company records?

A. No; there wasn't any mention made about that. At the particular time he called, as I recall, there wasn't a mention made as to the difference between Coast and Union Bond [253] records.

Q. You knew there before that Mr. French went to the Coast Redwood Company office and examined the Coast Redwood records?

A. It was some time afterwards, yes. That is when I believe I called him.

(Testimony of Paul C. Owens.)

Q. Do you recall, Mr. Owens, sending out the monthly recap for November and December, 1953, for the Coast Redwood logs?

A. Well, it was sent out, so I presume it went out in the regular course of business, yes.

Q. Do you have any recollection as to the quantities? A. Not exactly; no.

Q. I show you, from Defendant's Exhibit J, pre-trial, your monthly report or recapitulation for Blue Creek for the month of November, 1953, and ask if that refreshes your recollection that that is the report you sent?

A. Well, it looks like it is, yes.

Q. And it shows how many feet? A. 11,797.

Q. Of redwood? A. Of redwood only.

Q. And the same in December, and the quantity in December?

A. Total in December, penciled figures, 257,519 feet.

Q. Let me call your attention to the previous months, or for the month of October; and give the quantities shown by that recap. [254]

A. The quantities as shown in pencil—incidentally, these pencil figures are not mine—is 1,301,857.

Q. However, those figures are the addition of the totals of your figures? A. Yes.

Q. Now I show you, Mr. Owens, a letter on Coast Redwood Company stationery, from you to Harold L. Ward, dated February 16, 1954, and ask you if

(Testimony of Paul C. Owens.)

that is your signature, and if you recall signing it, in the ordinary course of business?

A. Yes; it is.

Mr. Rank: The letter reads as follows:

“Mr. Harold Ward,

“Blue Redwood Co.,

“Orchard Lake, Michigan.

“Dear Mr. Ward:

“Some time ago, we sent you a few log tickets for the months of November and December, 1953. These tickets for the month of November, totaled 11,797 feet; and for the month of December, 257,519 feet.

“The total logs removed for the month of November were 2,060,425 feet, and for the month of December, 2,953,271 feet. The balance of the tickets for these months are being sent to you, airmail, this date.

“Yours very truly,

“PAUL A. OWENS.” [255]

Is it correct, Mr. Owens, that those additional figures that you put in there were figures showing the quantities removed by Union Bond and Trust Company for the months of November and December?

A. As I recall, I believe—I don’t know whether they were additional figures or if they were added to them, but the figures in there, yes.

Q. In other words, the first figures were Coast Redwood figures, and the large figures were the total of Coast Redwood and Union Bond and Trust?

(Testimony of Paul C. Owens.)

A. Either a total or additional amounts. Which-ever it was; I don't know offhand.

Q. To your knowledge, so far as you were concerned, that was the first time, was it not, that any logs removed by Union Bond and Trust were reported in any manner to Wards?

A. To my knowledge, yes.

Q. Will you explain, Mr. Owens, under whose directions and instructions, you sent that letter?

A. Well, that letter was made up on my instructions from Mr. Wilson through a telephone conversation.

Q. After you told him about Mr. Fletcher's call?

A. That, I don't believe, has no bearing. I don't know whether it does or not.

Q. Whether it has a bearing or not; was it after your reporting Mr. Fletcher's call? [256]

A. That, I wouldn't say. I don't know.

The Court: What is the date of that letter?

Mr. Rank: February 16th. Mr. Phelps' call was February 11th.

Q. (By Mr. Rank). Where did you get this information? A. Where did I get it?

Q. Yes. A. Off the pink tickets.

Q. You still had the pink tickets?

A. That is right.

Q. You had sent the white tickets on?

A. That is correct.

Q. You did not have any record of the white tickets? A. No, sir.

Q. Did you hear anything more about this mat-

(Testimony of Paul C. Owens.)

ter, about the possible discrepancy of reporting, from February 16th on to May 12th, let us say, the time of termination?

A. The exact day I heard, I wouldn't say. I don't really know, Mr. Rank. I wouldn't want to say.

Q. From what source did you hear anything about it further? Before you answer that, Mr. Owens, I will let you think about that.

Mr. Rank: We will ask that the exhibit just referred to, that is, Defendant's J for identification, be marked in evidence as Defendant's Exhibit J. It contains the monthly [257] recaps from January 1st, 1953, to the end. In other words, all the monthly recaps that he received.

The Court: Admitted.

Mr. Phelps: From January 1st on?

Mr. Rank: 1953.

(Defendant's Exhibit J for identification was thereupon received in evidence.)

Mr. Rank: I also offer the letter of February 16th, which has just been referred to in the testimony, and ask that it be marked next in order.

Mr. Phelps: No objection.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit S.)

Q. (By Mr. Rank): Now, have you had a

(Testimony of Paul C. Owens.)

chance to think, Mr. Owens, as to the answer to the question?

A. Well, I have; but I do not actually know, Mr. Rank. I wouldn't want to state.

Q. From whom did you hear, if anything, about this matter next?

A. I don't even know that. There has been a lot transpired on this particular matter up there over a period of months.

Q. Incidentally, you mailed the pink slips, covering November and December, to the Wards, did you not?

A. I don't know whether I did or somebody else did. But I know they were mailed. I mean I personally took them out of [258] the file.

Q. You knew where they were all the time?

A. The pink slips; yes.

Q. They were not misplaced or lost or anything of that nature? A. No.

Q. Bringing you up to the date now, Mr. Owens, of May 12th—that was the date notice of termination was sent; do you recall?

A. I had no knowledge of that.

Q. You had no knowledge?

A. I mean as far as I was concerned, I don't believe I ever saw it. As a matter of fact, I never knew it, I believe, until you came to Eureka.

Q. That was the first you knew about it?

A. As far as the letter of termination, the first I heard of it.

(Testimony of Paul C. Owens.)

Q. The first you heard of any cancellation of the contract?

A. Never knew it before that I know of. And I never have seen any evidence of the fact yet.

Q. Did you have any conversation with Mr. Wilson concerning this matter from the summer of 1953 until May 12th, other than you have testified to here? By "this matter," I mean a possible failure of reporting Union Bond and Trust Company logs? [259]

A. Well, we had a conversation. The exact time, I don't know when it was. It has been some time ago when we had a conversation. Probably after you people notified him or somebody notified him of it. Then he wanted to know why I had not done it.

Q. He wanted to know why you had not done what?

A. Why I had not sent Union Bond out; why I had not made stumpage reports, and so forth.

Q. What did you reply?

A. My explanation was the same explanation given to this Court.

Q. Do you recall, Mr. Owens, that Mr. Wilson was in Eureka at the time the notice of termination was sent and mailed, May 12th?

A. I don't offhand know that. He made a lot of trips there.

Q. Let us go back a little. Do you recall having a conversation with me on March 24th and 25th, 1954?

(Testimony of Paul C. Owens.)

A. If those were the dates—I don't recall the dates.

Q. Let us take March 24th, the first one. Where did that conversation take place, and when?

A. Well, I talked to you at one time, I believe—well, it was in a nightclub, at Lindsey's.

Q. We met first where? In my room at the hotel?

A. That is possible. [260]

Q. Relate, as far as you can, our conversation. What do you recall of it?

A. I wouldn't want to be held to much on that conversation; not when I am drinking. I don't want to be held to that conversation.

Q. Were you drinking, when you first got there?

Mr. Phelps: If your Honor please, I am going to object to this. It is hearsay. It is not binding on the defendant.

Mr. Rank: It is certainly proper cross-examination—statements at other times and places.

The Court: It is proper cross-examination.

Mr. Phelps: Do you think it is, your Honor?

The Court: I do not know what it is. He is asking for what was said at some time to the attorney.

Mr. Phelps: Is Mr. Rank proposing to be a witness? I do not understand the purpose of it.

The Court: I assume that counsel would not take up the time of the Court unless he was endeavoring to establish some different statement by the witness.

Q. (By Mr. Rank). Do you recall the opening of our conversation? And that was before you had a drink, Mr. Owens.

(Testimony of Paul C. Owens.)

A. No. I had some before I got there.

Q. Well, I didn't know that.

A. And so I wouldn't; and I wouldn't want to be held too much to that one. [261]

Q. Do you recall any of the conversation?

A. Well, I wouldn't want to have to put it on paper, if that is what you mean.

Q. Do you recall asking me what I was doing up there? A. Well, I presume I would do that.

Q. Do you recall my reply to you?

A. Not in so many words; no.

Q. Do you recall my reply to you, that I was looking into this Ward matter, this possibility of failure to report logs?

A. You might have said something to that effect. I don't know just what was said.

Q. Do you recall my saying to you that I knew the picture, but I wanted you to talk and tell me what happened?

Mr. Phelps: If your Honor please, this is all self-serving.

Mr. Rank: This is a conversation on which we are entitled to cross-examine this witness and it will soon become very evident what we have in mind.

Mr. Phelps: It is all self-serving.

The Court: I do not think there is any such thing as a self-serving cross-examination.

Mr. Phelps: Of the attorney saying, "Do you recall?" certain things being said, that is without foundation at the moment. The witness says he does not recall what Mr. Rank did say. Apparently, and

(Testimony of Paul C. Owens.)

it is quite obvious, evidently, that the [262] conditions were such, if anything was done or said, Mr. Rank is in a position to say anything in the world was said, and put words into his mouth.

The Court: That is true, but the Court is always in the position to evaluate the weight of that sort of thing.

Q. (By Mr. Rank): Let us see, Mr. Owens. You said you had a drink before you arrived at the hotel. Where were you just before you came to the hotel? A. Probably in my office.

Q. In Arcata? A. Yes.

Q. Is it possible that you had a drink there?

A. Oh, certainly. I always have liquor there.

Q. So you might have had some drinks there before you came to my hotel? A. Certainly.

Q. At least when you arrived at the hotel, I did not have any drinks to your knowledge; had I?

A. That I couldn't say, Red. I don't know.

Q. Do you recall my making the last statement to you that I wanted you to tell me what had gone on?

A. I wouldn't know. You might have. As far as being held to any conversation in the evening there——

The Court: Mr. Witness, it is not a question of your being held to any conversation. All you can do is answer the [263] questions. If you do not remember, you can say you do not remember; but it is not for what you said or not. It is only for you to

(Testimony of Paul C. Owens.)

for what you said or not. It is only for you to answer the questions.

The Witness: Well, I don't remember; I will put it that way.

Q. (By Mr. Rank): Does this refresh your memory then, that your reply to me was, "Red, I am not going to lie to you for nobody." Do you remember that? A. No.

Q. You and I have known each other for a long time? A. That is correct.

Q. We have always been very friendly; have we not? A. That is correct.

Q. Do you recall then, going on and telling me the fact of the Union Bond and Trust logging in the Ward land and about talking with Mr. Wilson about what you should do with the pink slips, and what he told you? Do you recall any of that?

A. I don't recall the whole conversation; no. I don't remember it, Red, that much.

Q. Do you remember us having a conversation the next day, in the day time?

A. Over the telephone; yes.

Q. Do you remember us talking to each other personally and directly in your office? [264]

A. I believe you was in my office the next day; yes.

Q. You had not been drinking then, had you?

A. No.

Q. So you should remember everything that was said? A. Yes; that is right.

Q. Do you remember at that time, opening your

(Testimony of Paul C. Owens.)

cash book and showing me the figures of the dollar value of the sales of Union Bond and Trust month by month?

A. Not month by month. I had a couple of sheets there, and you asked to see how I kept my records.

Q. I thought you testified a little while ago that you did not keep any cash records.

A. Month to month, and then I destroyed them, the same as I said on Ken Elliott's log haul books. I didn't keep a record of that type.

Q. How long did you keep those records?

A. Up to the end of the month, until my bank is reconciled.

Q. Do you recall showing to me, Mr. Owens, your records for several months—in fact, the entire year of 1953, insofar as Union Bond and Trust Company was concerned?

A. No; not Union Bond.

Q. Would you say, then, that you did not have those figures before you for several months?

A. I might have had a couple of months.

Q. But not all five months? [265]

A. No, no, no.

Q. Do you recall, Mr. Owens, pointing to your shelf and showing me your Union Bond and Trust Company stumpage book?

A. No. I think I pointed and showed you those. (Indicating exhibits.)

Q. It is your testimony that you did not have

(Testimony of Paul C. Owens.)

the Union Bond and Trust Company stumpage book? A. No.

Q. Do you remember a little later in that day I was at your office and you were away and you telephoned me at the office and told me to go next door to Bready's office and you would phone me there?

A. I believe probably I did that day.

Q. Do you remember why you told me to do that? A. You wanted to look at a book.

Q. Why did you tell me to go next door?

A. I don't recall. Probably there was some people in my office.

Q. What book did I want to look at?

A. You wanted to see some figures on Union Bond and Trust. Which book it was I don't even know, Red.

Q. What did you tell me when I went next door?

A. I don't remember what it was.

Q. Didn't you tell me to write on a slip of paper, go in and hand it to your girl, and tell her to give me that book? [266]

A. No; I don't remember that, Red.

Q. You do not? A. No.

Q. Do you remember picking up the Union Bond and Trust Company stumpage book and meeting me at the Shell Service Station?

A. No, sir; I don't remember that.

Q. Do you remember letting me take that book that afternoon to get information from it?

A. No; I don't remember that.

(Testimony of Paul C. Owens.)

Q. Do you remember my returning that book to you later that evening?

A. You brought a book but I don't believe it was that one. I don't recall that.

Q. Do you remember my telling you that I had photostatic copies made of the pages?

A. No; I don't remember that.

Q. Let me see those. Do you know the firm of Proctor's Lab and Camera Shop in Eureka?

A. Yes, sir.

(Photostatic copies of documents handed to Mr. Phelps.)

Mr. Phelps: I can't look at all of these in a second. [267]

Mr. Rank: I just say keep them in order.

Mr. Phelps: I will keep them in order, certainly.

Q. (By Mr. Rank): Will you please examine these, Mr. Owens, without making any comment or anything? Just examine them and familiarize yourself with them.

The Court: What are they? It saves a lot of time. What are they, Mr. Rank?

Mr. Rank: Photostatic copies of the stumpage book, the very records Mr. Owens testified he did not keep. He forgot.

The Witness: No. Those records were not kept by any of my people.

Q. (By Mr. Rank): Were these records kept in your office? A. Not that I know of.

Q. These did not come from any records in your

(Testimony of Paul C. Owens.)

office? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. And you are testifying to that at the present time, are you, Mr. Owens?

A. Yes, sir. I can tell by the writing.

Q. What girls were in your office in April?

A. In April? Let's see. Mrs. Denny, I believe; and I believe Mrs. Charley was there, too.

Q. To refresh your recollection on that, didn't Mrs. Denny come quite later than April? [268]

A. Yes; I guess she did.

Q. You do not recognize the handwriting of any of these? A. No.

Q. Where would you think this information came from, Mr. Owens? A. Well, I don't know.

Q. What is the information that it contains?

A. It looks to me like stumpage information all right.

Q. In other words, it looks to you like exactly the same type of book that you kept for Coast Redwood?

A. Similar, the same thing, practically.

Q. Only this is Union Bond & Trust Company, similar type of information?

A. That is correct.

Q. In other words, this contains the information as to the quantity of logs removed each day, does it not? A. Yes; it does.

Q. And the Section from which they were removed? A. That is correct.

Q. The logger that did the logging?

(Testimony of Paul C. Owens.)

A. That is correct.

Q. The date? A. That is correct.

Q. And summaries and totals?

A. Well, I assume it is that; yes. But this is not any of [269] my people that did that. I mean just looking at the writing.

Q. Have you any idea where this might have come from? A. No, sir.

Q. Not the slightest idea? Who would have information like this, if you wouldn't have it?

A. I don't know, unless you people would have it.

Q. Well, that is a good guess, Mr. Owens. Were you instructed not to bring any records here?

A. No, sir. I was instructed to bring all the records I had, Mr. Rank.

Q. By whom were you so instructed?

A. The Court.

Q. Anybody else? A. No.

Q. Did you talk to anybody about what records you were going to bring?

A. I talked to, I believe, Mr. Mills and Mr. Phelps, and told them today this is what I had.

Q. Did you talk to Mr. Wilson about it?

A. I told him I was bringing all the records I had.

The Court: You had better have these marked for identification.

Mr. Rank: I will have them marked for identification.

Mr. Phelps: May we have those marked for identification?

(Testimony of Paul C. Owens.)

(The records referred to were thereupon, marked [270] Defendant's Exhibit T for identification.)

Mr. Phelps: I see, your Honor, it is after 4:00 o'clock. We have in mind the problem we were discussing. Is this a convenient time to adjourn?

The Court: Would you like to take an adjournment now?

Mr. Rank: The Court was planning to go a little later. It doesn't make any difference to me.

The Court: Do you have considerable more cross-examination of this witness?

Mr. Rank: Yes; I will.

Mr. Phelps: I will have some also.

The Court: All right; 10:00 o'clock tomorrow morning.

(Thereupon, an adjournment was taken to the hour of 10:00 o'clock a.m. on Wednesday, November 24, 1954.) [271]

November 24, 1954, 10:00 A.M.

The Clerk: Union Bond and Trust Company versus Blue Creek Redwood Company, further trial.

Paul C. Owens on the stand.

PAUL C. OWENS

a witness called on behalf of the plaintiff, being previously sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

Mr. Phelps: Ready your Honor.

May I make one statement, Mr. Rank, with the Court's permission?

Mr. Rank: Yes.

Mr. Phelps: If your Honor please, I think it appropriate to state this to your Honor, because last night, in going over the transcript, which I have obtained a daily copy of the transcript of the testimony, in going over that with Mr. Owens, it was quite apparent to me from the nature of the examination that Mr. Rank had some specific record in mind. It was equally apparent to me, from what the witness testified, that he had one record in mind, and Mr. Rank had another, and because of that I questioned Mr. Owens at some length further, and found out and developed for the first time last night that apparently the situation is this—and I [273] advise the Court and counsel so that he may be advised as to further cross-examination.

The situation is this—and this can be developed: Apparently in the accounting field there is a distinction between books, accounts and records of a firm and those work records which are the work records of the accountant used for reconciliation and the accounts used in the firm, and the use of

(Testimony of Paul C. Owens.)

them is much similar to that of a lawyer's notes. They are not audited, they are not reconciled, they are simply work records.

Just these three documents were produced as called for according to Mr. Owens' understanding of the subpoena as the records that he was keeping and attempted to keep for the Union Bond and Trust Company. It develops that in addition to that, Mr. Owens has, and had, other records which are his work records kept in his office and used for his own use.

The Court: Mr. Phelps, I don't like to interrupt you, but we are engaged in taking testimony in the case——

Mr. Phelps: I understand.

The Court: It makes it very difficult for the Court to distinguish between what statements are being made by counsel and what the evidence is in the case.

Mr. Phelps: My only——

The Court: I just don't know what you are getting at. If it is some comment on the evidence, I think you could bring [274] that out in the testimony of the witness.

Mr. Phelps: I will do that, but may I be permitted, just so that your Honor may understand, because there is another matter that I want to take up also, if I may be permitted—I won't trespass, your Honor, believe me, but at any rate, might I just then state that there were those two records. And this is what I was leading up to. That with

(Testimony of Paul C. Owens.)

respect to those other records and documents, might we say this: That if the Court feels that they were covered by the subpoena we would produce them; and, if Mr. Rank, even if they are not covered by the subpoena, wishes them, I will produce them for him. That is what I was leading up to, your Honor—so that he may use them for further cross-examination.

And the second matter that I have in mind was with respect to these work records here that were brought in, photostatic copies of them. And I want to say with respect to those if your Honor please, that again the same situation prevails; and I won't trespass by saying what the testimony of the witness will be with respect to them, but again if those are the records that he had as work records, again I shall produce them if counsel wishes them. And I wanted to say that.

Then, finally, if your Honor please, counsel had asked us to produce, and we received last night, some of those Elliott reports. Insofar as they were available, they are there for [275] your use.

I thank you, your Honor.

Mr. Rank: Mr. Phelps, I understand then, and Mr. Owens, I understand that you are going to produce them——

Mr. Phelps: If you wish them; yes.

Mr. Rank: This is what I subpoenaed and the other book.

Q. (By Mr. Rank). In other words, Mr. Owens, as I understand, you are going to produce——

(Testimony of Paul C. Owens.)

Mr. Phelps: Why don't you question him about it?

Mr. Rank: I beg your pardon.

Mr. Phelps: I will produce any and all records that you asked me for. That is the point I wanted to make to you so that you would have in mind the books and records. The only purpose of my making the statement, was so that you would know what they were, so that you could be advised as to cross-examination, so you would be advised I was willing, and wanted to produce them for you.

Mr. Rank: Let's understand each other, as to what records you are going to produce, Mr. Phelps.

Number one; you are going to produce the book, or whatever it may be, containing the original pages of which Defendant's Exhibit T for identification, are photostats?

Mr. Phelps: Yes, Mr. Rank.

Mr. Rank: That is number one.

Mr. Phelps: With this qualification: That, as the matter [276] now stands——

The Court: Gentlemen, I am really not interested in this colloquy. It doesn't help me. Why don't you proceed to examine and develop what you want to develop.

Mr. Phelps: Very well.

The Court: There is too much fencing about it.

Mr. Phelps: Why don't you do this: You tell me what you want and we will be glad to produce it.

The Court. Go ahead and examine him about it.

(Testimony of Paul C. Owens.)

Q. (By Mr. Rank): Mr. Owens, I understand that you have in your possession, at Arcata, the original records from which these photostats were taken, now referring to Defendant's Exhibit T for identification.

A. Well, I will qualify that to this extent, Mr. Rank. I came here early this morning, and reviewed these, looked at them more closely than I did yesterday; and I am reasonably certain that they are the records, yes, and the book that I maintained will bear out whether they are or not. [277]

Q. When can you get that book down here?

A. Well, what I had in mind, whatever you people develop in the way of any of my work papers or whatever you wish, I could probably get them here by air express Friday.

Q. The other book that I want, Mr. Owens, is what you call your cash book.

A. Well, what I would—all right; what I would term my cash record.

Q. Yes, the book that you have that shows the dollar receipts and sales of logs.

A. I would like—I don't want to hold you up——

Q. Go ahead, Mr. Owens.

A. But at this time I would like to state this: that insofar as that subpoena was concerned, it was always my intention that the original permanent records other than the ones that I brought in would be the ones that are maintained in Portland and not

(Testimony of Paul C. Owens.)

work records that I would keep for my own benefit in maintaining their records. Now if it is necessary that my records that I maintained normally be brought in, I will be glad to do so if everybody wishes that.

Q. Yes, Mr. Owens. The records that I had specific reference to is the book that contains among other things the dollar value of sales of logs for each month in 1953.

A. That would be the sales book record.

Q. In the same book there are also other entries, there is [278] the listing of checks and withdrawals against the bank account and there is the total quantity of logs sold each month. That is the book wanted.

A. That book would only to do insofar as any work that I had to do in Arcata and would not be the final record of Union, you understand that.

Q. I know. It is the permanent bound book that you keep showing those records.

A. That would only——

Q. You still have those books?

A. They are my own work records which I always maintain.

Q. Just one thing further. I am referring now to Defendant's Exhibit T, and referring, say, to the month of October, is that in Mrs. Denney's handwriting? Would you just check that for me?

A. No, as I said yesterday, Mr. Rank, and again this morning, it is not. I mean, I am not saying it

(Testimony of Paul C. Owens.)

is not; I say reasonably I am sure it is not; I don't believe it is.

Q. You are going to bring in the originals of these papers? A. That is correct.

Mr. Rank: Fine. If the Court please, that places me in a position where I am not sure whether I want to continue my cross-examination of this witness until those records are here. Maybe there are a few matters that I could go on with and then reserve the rest of my cross-examination until the records are here. I don't know quite what to say or do about it, and [279] I think your Honor can understand my position in view of the testimony yesterday.

The Court: Is there any question as to the correctness of these photostatic copies that you want to develop?

Mr. Rank: No, those are the records insofar as that information is concerned. I will go on a little any way.

The Court: What difference would it make if you had the original record here, if this is a photostatic copy of the original, as to the subject matter that you wish to examine the witness about concerning these matters?

Mr. Rank: You see the subject matter contained in those records, Defendant's Exhibit T, are already admitted by the plaintiff now. They were denied at first. Your Honor may recall in the first complaint and in the affidavits they denied those facts. The importance was the fact that the existence of those

(Testimony of Paul C. Owens.)

records was denied. Those are the records—and I will ask one or two questions, if the Court please.

Q. Mr. Owens, at the time Mr. French came into your office to see the Union Bond & Trust records, the original of the records which we have as defendant's Exhibit T were in your office, were they not?

A. That I would hesitate to say, Mr. Rank, because the record—that particular record, if that be a copy of the same, was not kept in my office—it was not kept by any of my people in my office. That is the reason I said I didn't think [280] this is Mrs. Denny's handwriting.

Q. However it was in Arcata or at the Coast Redwood Company?

A. No, either in Arcata or Eureka, possibly; one of the two.

Q. In other words, you had it under your control?

A. As far as that work record, yes.

Q. The information contained in that exhibit for Union Bond & Trust Company is the identical same information that is contained in the stumpage book—the same class of information I mean—that is contained in the stumpage book of Coast Redwood Company?

A. Yes, in the same category. It was handled a little differently.

Q. But in any event it gave the same general information as to the quantity of logs removed by Union off Ward lands contained like books for

(Testimony of Paul C. Owens.)

Coast Redwood Company for logs removed off Ward lands?

A. Yes. The only difference being, Mr. Rank, that the stumpage book for Coast was maintained by settings, landings, and this particular book was maintained by sections.

Q. So that after Mr. French had examined the Coast Redwood books and had obtained the information there as to the quantities removed by Coast Redwood from the Ward lands and then sent to your office, and had he seen these records, he would then have known the amount of the discrepancy and the fact of the discrepancy in the reports, wouldn't he? [281]

Mr. Phelps: That is hypothetical, your Honor.

Mr. Rank: I think this witness can answer that question.

The Court: Of course, what he would have known about it is somewhat hypothetical.

Mr. Rank: I appreciate that.

Mr. Phelps: I will withdraw the objection.

A. I would say yes, Mr. Rank, I would, yes.

Q. (By Mr. Rank): Isn't it true that when you called Mr. Wilson, after Mr. Fletcher had called you and told you that Mr. French was coming to inspect the records, that Mr. Wilson told you in sum and substance to permit Mr. French to see all the Coast Redwood records and to tell him the Union Bond & Trust Company records were in Portland?

A. Well, that is true, Mr. Rank, and——

Q. And following that instruction——

(Testimony of Paul C. Owens.)

Mr. Phelps: He started to explain and you cut him off.

The Witness: I was just going to say this, to clarify this for everybody, Mr. Rank, that that book that I kept as a work record was unknown to anyone else but myself at that particular time, that I even maintained a book.

Q. (By Mr. Rank): Is that in your handwriting? A. No, it is not in my handwriting.

Q. It was known to the person keeping the record? A. Well, yes.

Q. Who kept the record?

A. I had a man over in town that had previously worked for me [282] and was then working on a job but was not receiving sufficient income, and to help him out I had him do this work for my benefit, so I could at least have some figures in case at any future time they might be needed. But you ought to bear in mind at the same time this is being done that the white slips were then going to Portland, Mr. Rank, and I assume that Union Bond, which I am also assuming, had maintained a stumpage ledger record or a depletion record which they had done for a number of years since being owners.

The Court: Then the same information was available there of which Defendant's Exhibit T is a photostatic copy; it was being sent by you to the Portland office of Mr. Wilson?

A. The information. I was sending the original white slips.

(Testimony of Paul C. Owens.)

Q. The same information that you collected in the record of which Exhibit T is a photostat?

A. That is correct.

Q. (By Mr. Rank): In other words, you made this record from the white slips, and then when you completed the record you mailed the white slips to Portland?

A. That is correct, Mr. Rank.

Q. One further question. In march of 1954, when I visited you, the book containing these pages was in your Arcata office at that time?

A. I believe it was.

Q. Wasn't it referred to and called Union Bond & Trust Company [283] stumpage book?

A. Whether it is called stumpage book or footage figures I do not recall that, Mr. Rank. I sometimes referred to it as footage figures or stumpage. In this particular case at the present time that book contains numerous items.

Q. On February 16th you wrote a letter which is in evidence, to Mr. Ward, in which you mentioned for the first time, and there was mentioned for the first time to your knowledge, any information concerning logs removed by Union Bond & Trust Company from the Ward lands. Do you recall that fact?

A. That is correct.

Q. About the same time you mailed to the Wards the pink log slips for Union Bond & Trust Company for November and December, do you recall that?

A. That is right, that is right.

Q. You had those pink scale slips in the vault at coast Redwood?

A. That is right.

(Testimony of Paul C. Owens.)

Q. They were not kept in a cabinet at your office? A. No.

Q. They were kept at Coast Redwood?

A. That is right.

Q. Under whose instructions did you mail the November and December pink slips?

A. Those were mailed by instruction of Mr. Wilson. [284]

Q. Under whose instructions did you send the letter of February 16th?

A. As I recall, Mr. Rank, Mr. Wilson requested that I send a letter of transmittal.

Q. And told you at that time to report in your letter Union Bond logs for November and December? A. That is correct.

Q. I notice the letter is on the Coast Redwood stationery rather than Union Bond & Trust Company. Were you instructed to use Coast Redwood stationery by Mr. Wilson?

A. Well, that I wouldn't—I don't recall that, Mr. Rank.

Q. Isn't it a fact, Mr. Owens, that Mr. Wilson told you to use Coast Redwood stationery so that the Wards would not be suspicious and become acquainted with the fact that there may be some Union Bond & Trust Company logging?

Mr. Phelps: That is argumentative.

Mr. Rank: I am just asking him a question whether or not Mr. Wilson told him that.

Mr. Phelps: That is not what he asked, and he has asked and answered this question.

(Testimony of Paul C. Owens.)

The Court: I will overrule the objection.

The Witness: Well, I don't remember that, Mr. Rank.

Q. (By Mr. Rank): Do you remember telling me that, Mr. Owens? A. No, I do not.

Q. When Mr. Wilson told you to report the Union Bond logs for [285] November and December, and sent the scale slips for November and December, was there any discussion as to what should be done about the June to October scale slips and report between you and Mr. Wilson?

A. Well, as I recall, I do not recall whether I was told to leave them or just what to do with them. I believe there was something—I am not definitely, sure, Mr. Rank.

Q. Maybe I could refresh your memory on that. Did Mr. Wilson tell you something like this: for you to send the November and December scale slips, that he could pay that, but not to send the others because he couldn't pay for the others at that time, or something of that nature?

A. I am not definitely sure whether he said as far as payment of them, Mr. Rank, and I didn't question him on it. I know I was told just to send those two months.

Q. Let us go back a little further, Mr. Owens. The first scale slips that you received for Union Bond & Trust logging were designated a "W" for Section 16? A. I believe that is correct.

Q. I believe you testified yesterday that you assumed that they were Ward?

(Testimony of Paul C. Owens.)

A. That is correct.

Q. As a matter of fact, that "W" meant Wilson, did it not?

A. That I do not know, Mr. Rank.

Q. You knew the owner and the person from whom Mr. Wilson [286] bought that Section 16, Senator Fletcher?

A. Merely hearsay on my part, Mr. Rank. I didn't know that from him. It was hearsay.

Q. Your understanding was it was from Fletcher?

A. Well, the understanding that I had, that Mr. Fletcher and the Ward people owned some property together. Whether that was true in this case or not I do not know and I never did know.

Q. However, you were not fooled at all. You knew that Section 16 was not Ward property in this contract, didn't you?

A. No, I wouldn't say that, Mr. Rank, because to answer it that way, I would have to go back to the fact that I didn't know, and I still do not know the stumpage belonging to Union Bond and Trust Company, I mean the true ownership of them.

Q. When Mr. Wilson told you, and you asked him what to do with the Union Bond & Trust Company scale slips, you were talking about, referring to, and had in mind, did you not, the scale slips for the logs coming off the Ward properties?

A. No, for this reason, Mr. Rank. At the time I asked Mr. Wilson—well, yes, as far as I knew they were Ward properties.

(Testimony of Paul C. Owens.)

Q. Yes?

A. As far as I knew, that is correct.

Q. You knew, of course, that Section 32 was Ward property and scale slips showing Section 32-W were Ward logs? A. That is right.

Q. Whether they were produced by Union Bond & Trust Company [287] or Coast Redwood?

A. They are Ward, that is correct.

Q. And you know that during each of several months there were logs from Section 32, Ward properties, produced by both the Coast Redwood and Union Bond & Trust Company?

A. Well, without checking the records, I believe they were.

Q. If you will take my statement, Mr. Owens, right in this court room we have the scale slips covering that. Did you have a discussion with Mr. Wilson, not specifically covering Section 2, but that general question, wherein you asked him again what to do with the scale slips and he told you in effect, "Just keep them. I will tell you some time what to do with them."?

A. No. Well, the only time we discussed that, Mr. Rank, was after the month of April. I remember that, due to the fact that it was something new to me, that I had not seen before, and as I remember it, I called him some time in the month of May requesting what to do with the April pink tickets. Subsequently there I don't remember any conversation, oh, for the balance of that year.

(Testimony of Paul C. Owens.)

Q. Do you remember having a conversation with Mr. Wilson concerning this matter at some time probably just before Christmas of 1953?

A. Well, it would be possible, Mr. Rank; I don't recall just when our next conversation was. [288]

Q. Do you remember having a conversation with Mr. Wilson in which he more or less reprimanded you for sending a report to Ward—I imagine it was the November or December report—showing such a small quantity of logs, and he reprimanded you for doing that because that might make Wards suspicious? Do you remember a conversation like that?

A. I do not know if it was put in the words of being suspicious. I remember getting reprimanded for sending that report. I don't know just what month it was, Mr. Rank, and I don't recall just when that was.

Q. It might have been the conversation just before Christmas?

A. It could have been. I don't know.

Q. In your testimony yesterday, Mr. Owens, you stated in response to my question that during the course of the year 1953 you sent various documents, records and reports to the Union Bond & Trust Company at Portland?

A. That is correct.

Q. What type of reports? Will you just give us in some detail what you said?

A. Well, I don't mean by that the reports, Mr. Rank. The main thing I meant was records of the company, such as invoices for purchases and checks,

(Testimony of Paul C. Owens.)

or I mean check copies. At the time our checks were made, and subsequent, they received check copies. Our duplicate slips for deposits of money were all sent there. Our cancelled checks and bank statements were all [289] sent there, and these white tickets were sent there.

Q. In other words, the Portland office had the same information as you did?

A. That is correct, generally speaking, Mr. Rank. [289-A]

Q. You sent the Portland Office the amount of the deposits and the record showing the source of the money which made up the deposit?

A. Oh, yes, yes.

Q. In other words, when you made a deposit of money received from Coast Redwood, of the logs removed from the Ward lands by Coast Redwood, that would be indicated in your deposit slip or whatever it might be?

A. You are speaking of stumpage now?

Q. Yes, stumpage. A. That is correct.

Q. You would also send to the Portland Office a report of the sales of logs by Union Bond and Trust Company, would you not?

A. That is correct.

Q. Showing both the quantity of logs sold and the amount received for the logs?

A. That is correct.

Q. During the course of 1953, Union Bond was doing a small amount or some logging on Section

(Testimony of Paul C. Owens.)

16, and the balance of the logging was primarily on the Ward properties? A. That is correct.

Q. Would you say—and this I know would be just an estimate on your part, Mr. Owens—that the ratio of logs removed would be something like about 75 or 80 per cent of the [290] logs removed and sold by Union Bond and Trust Company were removed from the Ward properties, and the balance from Section 16? Is that a fair ratio? Is that a fair statement?

Mr. Phelps: I submit the record——

Mr. Rank: Well, if the witness can testify——

The Witness: Well, I would say, Mr. Rank, it would be 75 per cent or better.

Q. (By Mr. Rank): Yes, 75 per cent or better from the Ward properties.

Now, did you also write letters to the Portland office, I mean letters of transmittal?

A. No, at that particular time, Mr. Rank, I do not believe there is a letter of correspondence in the Portland Office during the year 1953 that I know of.

Q. No letters of transmittal?

A. No, sir.

Q. You would simply send the reports and the records and whatever information of that type was supposed to have gone to the Portland Office.

A. That is correct.

Q. Did they ever write you for further information?

A. Well, that might be possible, Mr. Rank. That

(Testimony of Paul C. Owens.)

would be very possible. I don't recall it off-hand, but they could have written. Well, yes, they did occasionally write, I believe, for additional checks or something like that that I [291] might have omitted, which would then be sent on to them in case they were misplaced.

Q. Indicating that they were keeping a record up there and were advised of the various things that you were doing, the information that you had been sending on to them? A. That is correct.

Q. I show you, Mr. Owens, just for identification, a series of pages attached together. It appears to be a photostatic copy of an order and contract, and I ask you if that is the photostat of the original agreement between Union Bond and Trust Company and Coast Redwood, which was approved by the bankruptcy court in Los Angeles, and provided for the logging by Coast Redwood of the Ward and Sage properties? A. This is one of them, Mr. Rank.

Q. Yes, that is the first one.

A. There are several agreements.

Q. And that was the original agreement?

A. April 4th.

Mr. Rank: I just ask that this be marked for identification.

(The document referred to was thereupon marked Defendant's Exhibit U for Identification only.)

Mr. Phelps: Do you want to encumber the record—— [292]

Mr. Rank: I am not going to put it in evidence.

(Testimony of Paul C. Owens.)

Mr. Phelps: Because it is already in evidence.

Mr. Rank: I know. The record is getting pretty heavy and I am not going to put it in evidence.

Q. (By Mr. Rank): You are familiar with this document, of course?

A. I have read it, oh, at the time it was made, Mr. Rank. I have not referred to it since.

Q. All the questions I am going to ask you is simply this, of which you are well aware, that under the terms of that agreement, Coast Redwood was licensed by Union to conduct logging operations on the Ward properties, and Coast Redwood agreed to pay Union Bond and Trust Company \$5.00 per thousand stumpage for all logs removed from the Ward properties, that is correct?

A. That is correct.

Q. And it was provided that those payments could be made weekly?

A. That is also correct.

Q. During the June to October period, were those payments in fact made weekly?

A. By Coast Redwood?

Q. To Union Bond and Trust. A. Yes.

Q. They were made weekly very regularly, were they not? [293] A. Yes.

Q. So that during this entire period of time, June to October, as a matter of fact, may I change the question.

During the entire period of time that Coast Redwood was logging under that license during 1953 and into 1954, those payments were always made

(Testimony of Paul C. Owens.)

weekly, were they not? A. That is correct.

Q. So that, for example, Union Bond and Trust Company had deposited in its Bank account all of the stumpage money for the logs removed from the Ward property by a day, two or three days after the end of the month?

A. From monies received from Coast Redwood, now you are speaking of?

Q. Yes.

A. Yes, within four or five days at the most.

Q. In other words, a few days after the first week they would get the first week, and so on, and so within a few days after the end of the month, the Union Bond and Trust Company had all the monies for the Ward logs and the monies that were payments for stumpage? A. That is correct.

Q. Also during this period of time, Union Bond and Trust Company was selling on its own behalf and in its own name the logs that it was removing from the Ward properties?

A. That is correct. [294]

Q. Selling them to users in the general Eureka-Arcata area? A. That is also correct.

Q. Until you bring the records down, Mr. Owens, would these in round figures, from your recollection, be approximately the amounts of money that Union was receiving from the sale of those logs: June, \$34,000; July, \$72,000; August, \$56,000; September, \$84,000; October, \$101,000? Does that sound about correct from your knowledge?

(Testimony of Paul C. Owens.)

A. I would say substantially, Mr. Rank.

Q. Will you state how those payments were made and how often you got it, and so forth, and deposited it in your account?

A. You mean as to what we received?

Q. Yes, that is, your accounts receivable, your payments on your logs you sold to users?

A. From logs sold, Mr. Rank, the majority of mills in the area pay on a weekly basis, once a week, the following week. It is anywhere from Tuesday, Wednesday or Thursday. There are a few of them that pay on a semi-monthly basis. In other words, they will pay on the 5th for the preceding half, and on the 20th or 21st for the next half.

Q. So that regardless of which way they paid, by the 5th of August, for example, you had all the money in for the July logs?

A. Yes, I believe so.

Q. As a matter of fact, sometimes you got in a little ahead, [295] didn't you?

A. That is possible.

Q. So to sum up this last testimony, by the 5th of each month, whether it was July 5th for June logs or August 5th for July logs and so on, Union Bond and Trust Company had deposited and had placed in its account all the monies that were due it for all of the logs sold and for all the stumpage payments that it had coming from Coast Redwood?

A. That would be true with the exception of possibly one or two minor cases, which happened occasionally.

(Testimony of Paul C. Owens.)

Q. Is Mr. Wilson sitting in the courtroom?

A. Yes, he is.

Q. Will you point him out?

A. He is in the back there.

Mr. Rank: Will you stand up, Mr. Wilson?

(A gentleman in the courtroom arose.)

Mr. Rank: Mr. Ward was introduced. I wanted you introduced.

Q. (By Mr. Rank): The day after the termination notice was served, Mr. Wilson left Eureka and went directly to Chicago.

A. I believe I stated yesterday as to that, Mr. Rank, I do not know whether Mr. Wilson was there or not, because at the particular time I don't believe I even knew of the fact that he was served with a termination notice. I had heard that, yes, but I had no copy of it or anything, and I wouldn't say [296] that he was there, no, sir.

Q. However, you knew within a day or so following he was in Chicago, and went from Chicago to New York, because he talked with you on the telephone almost daily from Chicago and New York?

A. I believe I did talk with him from Chicago a couple of times. I do not know about New [296-A] York.

Q. One of the subjects of the conversations, was, was it not, "Where did we get our information?" he asked you that a couple of times, didn't he?

A. That could be, yes.

(Testimony of Paul C. Owens.)

Q. As a matter of fact, he told you that he suspected maybe your telephone line was tapped, did he not?

A. I don't recall that. Mr. Wilson said that a number of years ago.

Q. Didn't he say it on this particular occasion?

A. Well, I wouldn't—I don't—no, at that particular time, Mr. Rank, I don't recall whether he did or not.

Q. And didn't he tell you, instead of phoning from your office, instruct you to go to a telephone booth and call him?

A. I have done that, yes.

Q. And during this particular time?

A. Well, now, that has been done for, oh, a long time, Mr. Rank.

Q. Well, do you recall doing it during this particular week?

A. No, I don't; not just that particular week, because that particular week, actually I placed no emphasis on it; now, I mean.

Q. You know from Mr. Wilson's statements to you in that week or ten days there that he didn't know where we obtained our information as to the fact that Union Bond and Trust had been logging and not reporting logs; you know that? [297]

A. No. I am reasonably sure of that, Mr. Rank, yes.

Q. Because he didn't know, and you didn't know, of course, about our so-called Harvey reports?

(Testimony of Paul C. Owens.)

A. No, I never heard about a Harvey report, Mr. Rank.

Q. You didn't know about that information that Mr. Harvey was picking up up there?

A. No, I didn't know that any information was going out of the woods.

Q. So, therefore, as far as you knew at that time, Mr. Wilson nor you knew that we were getting any information at all as to what was coming out of the woods, other than the Coast Redwood reports that were being sent to us?

Mr. Phelps: That is argumentative and assuming a state of mind of someone else.

Mr. Rank: He has testified to these conversations with Mr. Wilson.

The Court: The conversations speak for themselves.

Q. (By Mr. Rank): You also testified yesterday that you had nothing whatever to do with the arranging for the money for the payment to Ward. Is that really true, that you had nothing whatever to do with it?

A. Well, yes, I would say, Mr. Rank, because of this fact: That whether we wired a good deal of money——

Q. Whether what?

A. Whether we wired or transmitted monies to other places or [298] other office bank accounts of the Union Bond and Trust Company, I had absolutely nothing to do with the transmitting of the

(Testimony of Paul C. Owens.)

stampage payments and I never knew when it was actually sent out, Mr. Rank.

Q. Didn't Mr. Wilson discuss with you when the time came for payment to Ward, how much it was going to be and where you were going to get the money and so forth?

A. Well, of course, we always talked about when we could make a payment—not to make a payment, but he would call for the figures. It is possible Mr. Wilson might have said, "I need some money to help make this payment." But the exact payment paid or the amount of it, I didn't know and I received no copies of any letters of transmittal in regards to that, absolutely none. So I had no knowledge of the exact time or of the amount paid.

Mr. Rank: If the Court please, I think I would like to continue the cross-examination of Mr. Owens until the records come in. And may I say this, Mr. Owens: I do not believe it is necessary for you to bring in the original of the pages and documents——

The Witness: The only reason I would bring them in, Mr. Rank, would be to substantiate the record.

The Court: Never mind. What is it you want?

Mr. Rank: I don't think it is now necessary for him to bring that in. [299]

The Court: You don't have to bring those.

The Witness: All right.

Mr. Rank: To bring in the originals of Defendants' Exhibit T, but I do want the cash book

(Testimony of Paul C. Owens.)

with all the information contained therein as it was back in March of 1954, Mr. Owens.

The Witness: There is no changes in it, Mr. Rank.

Mr. Rank: And with that I would like at this time——

The Court: You want to defer cross-examination as to that until Friday?

Mr. Rank: The entire cross-examination, yes, until he brings in those records.

Mr. Phelps: Are you limiting it to those records that will be produced? If there is anything else that he has I think that you ought to go forward with it.

Mr. Rank: I would like to go over the daily transcript which I received last night, and I think under the circumstances that the Court should permit me to resume my cross-examination when those records come in.

Mr. Phelps: All I wanted to know is whether you had anything else, Mr. Rank, you could do at this time.

Mr. Rank: I might say this, if the Court please: That I made request sometime ago for quite a bit of information and documents. So far I have received very few of them. I was just handed this morning a series of sheets, and I think [300] I should be entitled——

Mr. Phelps: I have no objection to your doing it.

Mr. Rank: All right.

(Testimony of Paul C. Owens.)

Mr. Phelps: What I had in mind, is there anything you can do now?

Mr. Rank: No.

The Court: All right; we will defer the further cross-examination of this witness until Friday, then.

Mr. Phelps: Certainly, your Honor.

The Court: You may step down.

Mr. Phelps: Mr. Ernest Harvey.

Mr. Rank: Aren't you going ahead with your case, Mr. Phelps?

Mr. Phelps: I am going to prove through Mr. Harvey—I have this situation, if your Honor please: We have had Mr. Harvey and Mr. Fleckner and three other witness all from out of town, all from the Northern part of the State. I wanted to avoid the expense, and for their convenience I wanted to put them on and dispose of them before the holiday. There was a considerable problem of transportation.

The Court: Are you going to use any of these witnesses?

Mr. Rank: Not necessarily. I am not necessarily going to have them back. If he puts them on, there may be one or two things I might want to ask them, but other than that, no.

Mr. Phelps: At any rate, I feel that at this point this [301] matter fits in quite nicely and I would like to go into it.

The Court: All right.

Mr. Phelps: Mr. Harvey, please.

ERNEST G. HARVEY

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court?

The Witness: Ernest Grover Harvey.

Direct Examination

By Mr. Phelps:

Q. Your full name, sir?

A. Ernest Grover Harvey.

Q. Address? A. Eureka, California.

Q. And in what general business are you engaged?

A. I am an employee of Mr. W. W. French.

Q. In what capacity, doing what?

A. Policing the logging area.

Q. All right. Now you were hired, were you not, by Mr. W. W. French in the fall of 1952 specifically for the purpose of policing the area of the Ward and Sage lands shown on the map, Plaintiff's Exhibit 1? A. That's right. [302]

Q. And your activities with respect to that were such that you made daily trips to the woods and the land where the logging was in progress, is that so?

A. I did.

Q. And in addition to your observations as to what was going on, you made inquiries from the

(Testimony of Ernest G. Harvey.)

various loggers, contract loggers and truckers, and developed information from them also?

A. Yes, occasionally.

Q. Let us refer to the calendar year 1953, sir, and particularly from June to October, '53. During that period of time, would you tell us, were you fairly familiar with the logging operations in that area?

A. Yes, I was.

Q. How about the locations of the various landings, were you familiar with all those?

A. Yes.

Q. Were you familiar with the location of the various roads?

A. Yes.

Q. And from the location of a landing, were you able to determine whether it was on Ward or Sage lands?

A. Yes.

Q. In addition to that, were you familiar with and was it a part of your duties to check running of property lines to see that the line was properly run so that logs coming from [303] adjoining lands would be properly branded?

A. That's right; I never checked the lines but I had to know where they were at.

Q. And then on the ground you checked the branding?

A. That's right.

Q. There has been reference throughout to the term "poles" or settings?

A. Yes.

Q. Is there any difference between those two terms?

A. No, not necessarily any difference.

Q. So when a setting number or a pole number is referred to, that would be to the same thing?

(Testimony of Ernest G. Harvey.)

A. Yes.

Q. And were you at that time familiar with the locations of the settings physically upon the land by number? A. Yes.

Q. In other words, a pole number meant to you, and you would immediately know——

A. What road it was on.

Q. Whose land it was? A. Yes.

Mr. Rank: Mr. Phelps, would it help you shorten to stipulate that he knew everything that is in his reports which are in evidence?

Mr. Phelps: I will accept that stipulation, and I want to [304] develop for the information of the Court——

The Court: Particularly at this stage of the case, I don't think I am interested in this. I say this very frankly to you, counsel; I am not interested in what the Ward people did. This is a suit that has an equity background to it for the purpose of determining whether or not the Wilson people are entitled to be restored to this contract, and if so, under what conditions. That depends on what Wilson did, not what Ward did. What the Ward people did to look out for their own interests in the matter doesn't seem to me to be particularly material at this point. Maybe I am a little bit abrupt in my statement, but I have already heard from Mr. French concerning this matter and what steps were taken by the Ward people with respect to finding out facts up there. But what has that got to do with the case? Maybe you can enlighten me on that and I

(Testimony of Ernest G. Harvey.)

can follow this testimony; but I have heard a lot of testimony already on this subject and I don't know quite where it has taken us. Maybe it is not in the right posture in the case and I can't get at it.

Mr. Phelps: Possibly not, if your Honor please.

The situation is this: That I want to develop and have to develop certainly from this witness that even preceding he time what was developed from this last witness, information was being furnished by Union Bond and Trust Company or Coast Redwood, as the case may be, to this man, [305] what it meant to him, the reports that he made, and the information that they had concurrently.

Mr. Rank: We will stipulate—I have offered a stipulation that as far as this witness is concerned, he knows all of the information and data that was in the Harvey reports that were sent to the Wards.

Mr. Phelps: Well, Mr. Rank, the information and what it means I can only develop from the witness. I think your Honor knows that I don't want to fly in the face of any of your Honor's thoughts.

The Court: I am not making up my mind about this case, but I am not able to place this. Maybe you can do it later in the case, but I am not able to place this particular subject matter into any relationship to the case. I could if I could get at it a little differently. I suspect that what you have in mind is some principle of waiver or estoppel?

Mr. Phelps: Oh, yes, Your Honor, there is a definite principle of waiver, but it goes beyond that.

(Testimony of Ernest G. Harvey.)

It is a question of performance of the contract, substantial performance under the contract, and what reports and information they were receiving.

The Court: I don't see what that has to do with paying for what you bought. If a man owes so much to another, he owes it or he doesn't owe, and he pays it or he doesn't pay it. The circumstances under which the payment or non-payment [306] are made are of course very important when the Court is called upon to make an equity decree, I realize that; but I could better understand this testimony if I had the circumstances under which the payments were made or were not made so that then these payments could be related. I know the order of proof isn't too important and these witnesses want to get away, but it is a little easier for the Court to understand it and I can get a better picture of the case if you proceed that way.

Mr. Phelps: Your Honor can well understand my personal preference would be to abide by Your Honor's wishes in that respect.

The Court: Well, go ahead.

Mr. Phelps: Let me explain the practical problem.

The Court: I am not telling you how to try the case; I just have some difficulty in seeing the relationship of this matter to the case as yet, and therefore if there are objections made, as able counsel here are likely to make them, I don't know how to rule on them, because——

Mr. Phelps: I don't want you to have to rule in

(Testimony of Ernest G. Harvey.)

a vacuum, Your Honor, but may I explain this practical problem, and perhaps this will point up the problem that I have with respect to these witnesses.

There are two witnesses who were subpoenaed from Eureka, Mr. Harvey and Mr. Fleckner. There is the problem of their [307] convenience. In addition to that, we have three more witnesses who are from Redding, the Santa Rosa area, and up north, Ukiah; I am not positive about the third one. But I have a problem——

The Court: The problem that I have is in trying to evaluate this testimony, Mr. Phelps. I don't know what relationship it has as to the failure to make the payments which in pre-trial it has been stipulated have not been made. Surely you cannot say—I don't suppose reasonably—that payments were not made because of something that the other side did?

Mr. Phelps: Oh, no.

The Court: The non-payment of the payments due may be excused because of some acts maybe, but I don't see that the non-payment has anything to do with what the plaintiff did. It may be that the non-payment was due to some factor that might excuse the non-payment.

Mr. Phelps: I see we have reached eleven o'clock——

The Court: I have a simple mind and I like to get right down to the fundamental issue of the case and then I can follow it better.

(Testimony of Ernest G. Harvey.)

Mr. Phelps: All right.

The Court: I don't know as much about this case as you gentlemen do; you have been living with it for a long time.

Mr. Phelps: That is an understatement, Your Honor. Why [308] don't we do this then——

The Court: At any rate, you go ahead and proceed the way you have intended; I don't want to be in a position of interrupting your train of thought and preparation in the matter, so I will get along the best I can.

Mr. Phelps: I don't want to trespass on Your Honor. Let me say this: There is also the additional problem that I have: It is again a practical problem, and I think Your Honor is entitled to know that I would like to tell Your Honor, and that is: That with respect to another witness that we will call on the problem which Your Honor has in mind, the question of the payment, Mr. Wilson, I wanted to have at the time that I put him on, some additional records that have been sent for which I am expecting and have not received. I think in order to complete it it is necessary, and I know that Mr. Rank will wish them, so there is that problem also.

As far as following the testimony is concerned, if Your Honor please——

The Court: Go ahead and do it the way you want. I do think this case is taking entirely too long on both sides. You have had a pre-trial conference and you know what it amounts to and it seems to

(Testimony of Ernest G. Harvey.)

me to be not too difficult. You say, "We are waiting for records, we have got witnesses here, and they have got to bring another record," and all of that. After all this is only a diversity case, and while it is [309] entitled to consideration in this Court, there are other cases that are also entitled to consideration, and we can move along much faster in this case. I don't think it is as complicated as it might have appeared to be at first blush after the pre-trial. Let's get along. I should criticize myself for talking. Go ahead with the witness and proceed the way you want.

Mr. Phelps: I was going to make this suggestion: If Your Honor is disposed to take a recess, we could take it at this time.

The Court: All right.

Mr. Phelps: Let me give that matter, Your Honor, some consideration and see what I can develop and work out. I will try to.

The Court: We will take the recess.

(Recess.) [310]

Mr. Phelps: If it please the Court, I think I have a solution to our problem. I propose to do this if it meets with your Honor's approval. There is a method that I can mechanically shorten both Mr. Harvey's and Mr. Fleckner's testimony. Mr. Rank is familiar with it. There are some affidavits that are filed and we can refer to them, so I propose, if it meets with your Honor's approval, to put Mr. Harvey and Mr. Fleckner on, and I can finish them

(Testimony of Ernest G. Harvey.)

before noon. So that disposes of that problem. I can be very quick. I will streamline it and highlight it.

Next at 2 o'clock this afternoon I will leave it to your Honor. If your Honor wishes, I am perfectly willing to put Mr. Wilson on, although there are some matters which will have to be furnished later. On the other hand, I have all these three witnesses who are experts on value, very similar to medical witnesses in a damage suit. So I do not think that interrupts the train of thought. It is evidence that has to come in. They are here, and, of course, we have to pay their expenses. I should prefer to put them on at 2:00 and finish with them, say, by 3:00 or 3:30, and then as soon as they are through, put Mr. Wilson on. If your Honor wishes, I will put Mr. Wilson on at 2:00, but I would prefer to do it the other way. But I am going to streamline it.

The Court: I have no particular views. Do you have these witnesses from out of town? [311]

Mr. Phelps: Yes, your Honor, and just like a medical witness, I would like to put them on. I do not think that interrupts any train of thought. It is necessary testimony and it has to be gone into under our theory of the case.

Mr. Rank: We, of course, are going to object to certain of the testimony from the valuation witnesses. How the Court is going to rule on that I do not know, in view of the fact that the balance of the case is not in. In order to accommodate counsel

(Testimony of Ernest G. Harvey.)

I won't raise any objection as to his order of witnesses in that phase of it, I will say.

Mr. Phelps: Let me say this: I have your Honor's problems in mind. I am going to do my utmost to cooperate with your Honor and I want to streamline this right now so far as these witnesses are concerned.

The Court: Go right ahead.

Q. (By Mr. Phelps): Mr. Harvey, I am going to show you a map here. Will you step to the board and see if you can identify the general area shown on this map as the area of the Ward and Sage lands, showing the roads?

A. You mean the roads into the Ward and Sage lands?

Q. Yes, these heavy lines here are the permanent roads, are they not? A. That is right.

Q. And the extensions thereof that are dirt roads or summer roads are included in dot-and-dash lines, is that not so? [312] A. Yes.

Q. You have referred to poles and settings, Mr. Harvey. There are numbers on the map from place to place, like 30, 1-A, and so forth; those are the poles or settings, is that right?

A. That is right.

Q. They are all numbered according to the road?

A. That is right.

Q. Of course, you have just seen this, and quickly, without holding you down to details, as you know the property, is that substantially the location of the roads on the Ward and Sage lands?

(Testimony of Ernest G. Harvey.)

A. That is right.

Q. I appreciate that you have not checked it, but checking it over quickly, a spot check would do, can you see the pole settings and are they, so far as you know them, placed as you know them?

A. Yes, as I know them.

Q. Of course, this map does not show the virgin timber. It is too big, and we folded it underneath. That would be down here. Will you take the stand?

We will offer that and ask that that be marked as Plaintiff's Exhibit next in order.

(The map referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 12.)

Q. (By Mr. Phelps): As counsel has said, you were aware daily [313] of all the information contained in this volume, Exhibit 11? A. Yes.

Q. Also you reported that on daily to Mr. Fleckner, copies of all these reports, your diaries and these reports were sent on to Ward in Orchard Lake and Fletcher?

A. They were reported weekly. They run in a day series, but they were weekly reports.

Q. Mr. Harvey, there is no question about this: when Union Bond & Trust Company commenced logging on its own account in those lands, you were aware of it as soon as it happened, is that right?

A. I was.

Mr. Rank: Just a minute. We will object to it. It calls for the conclusion of the witness. I am

(Testimony of Ernest G. Harvey.)

referring now to "on its own account." I do not know whether they know that.

Q. (By Mr. Phelps): Well, you knew that Union Bond & Trust Company was logging and so reported? A. I reported it.

Q. You knew that as soon as it happened?

A. Yes.

Q. You knew what contract loggers were doing it and what the equipment was? A. Yes.

Q. There is just one thing that needs to be explained, as I can see these monthly reports, sir. I will just take the report [314] for August as an illustration.

The Court: 1953?

Mr. Phelps: 1953, your Honor, the one indicating Ward, Sage and Wilson contracts and reports.

Q. The information by weeks, sir, is the information developed by you, is that not so?

A. Well, what do you mean by "developed by me"?

Q. The information contained there is information which you obtained weekly from either Elliott or Nelson, and then sent that report on to Mr. Fleckner? A. That is right.

Q. The figures indicated, then, where it is broken down further, this Ward or Sage or the combination of Ward and Sage were your figures by the week? A. That is right.

Q. So that insofar as those weekly figures were concerned, when you used the classification "Ward" alone, you knew that at least all that footage was on

(Testimony of Ernest G. Harvey.)

Ward land, didn't you, that week? A. Yes.

Q. You knew also that in addition to that there was some that could be Ward or could be Sage and both? A. That is right.

Q. This is my point. You as the man in the woods, knowing the setting, were the man that could tell currently and week [315] by week whether it was coming off the Ward side or a mixed setting or the Sage side of a mixed setting, isn't that true?

Mr. Rank: To which we will object as calling for the conclusion of the witness, and argumentative.

Mr. Phelps: I do not think it is.

Q. In the woods, observing it as you were doing, observing the operations on a given setting, that is, a mixed setting—— A. Yes.

Q. ——you could tell during a particular week whether in a mixed setting it was coming off the Ward side or the Sage side of the pole, couldn't you?

A. No, if it was coming off the same side on one day, you couldn't tell by the week or by the day, either one, how they were coming off.

Q. You have not answered my question. If they were coming off on the same day, but during a given time a pole is divided into four equal parts, and you log one-fourth of that circle at one time, don't you? A. Yes.

Q. During the time that you observed it, during that one-fourth of the circle, you would know whether that was Ward or Sage land as the case may be, is that right? A. Yes.

(Testimony of Ernest G. Harvey.)

Q. Mr. Fleckner would have no further or additional information so far as you know, sir? [316]

A. No, sir.

Q. Other than what you reported?

A. No, sir, so far as I know.

Q. So that in order to develop the total amount of what you would consider to be mixed Ward and Sage for the whole month, it was a simple matter of adding the weekly amounts that you had placed in that classification to develop the monthly figure?

A. That is right.

Q. The information contained in those monthly reports as to scale you obtained daily, or rather, weekly from Mr. Elliott?

A. That is right.

Q. And on the other south end from Mr. Nelson?

A. That is true.

Q. When you obtained them from Mr. Nelson you also obtained the information as to the ticket number, didn't you?

A. Yes, there were some ticket numbers.

Q. And you knew the ticket numbers, whether they were Ward or Sage, as the case may be, didn't you?

A. No, I went by landings only.

Q. You knew the ticket numbers, whether they were Coast or Union, didn't you?

A. I know them by the landings. The tickets revealed landings on them, and that is what I made up my reports on, from the landing, not from the tickets. [317]

Q. I know you did not make your reports from

(Testimony of Ernest G. Harvey.)

the tickets. My question is very simple. Did you know the series of tickets and what they meant?

A. I knew that they ran a series but I never paid any attention to the series.

Q. You knew this, that a certain series would be all Ward, another series of numbers would be all Sage?

A. Yes, I imagine so.

Q. In line with the effort here, Mr. Harvey, let me ask you this most leading question. You have filed an affidavit in connection with a motion for preliminary injunction?

A. Yes.

Q. Is all the information contained in that affidavit, as set forth in there, all the information that you know with respect to the activities from May 12th through May 24 or 25th, inclusive?

Mr. Rank: Do I understand, Mr. Phelps, that you are now endeavoring to shorten the proceedings by offering the affidavit?

Mr. Phelps: I am going to offer it, yes.

Mr. Rank: Is that what you are intending to do?

Mr. Phelps: Yes.

Mr. Rank: Because I have an objection to that, but if you want to offer it just for the purpose of identification, I won't object to this particular question. [318]

Mr. Phelps: Do you have any objection to this question:

Q. Is the information contained in your affidavit, which was referred to in your deposition, is that information true and correct?

Mr. Rank: Just a minute, Mr. Harvey. To which

(Testimony of Ernest G. Harvey.)

we object upon the ground that it is immaterial at this time, and may I explain that, your Honor? The information contained in the affidavit concerns the posting of notices and the putting up of the gates, and I believe it is being offered as a part of the case for damages, and so I would suggest this, that my objection be noted and the Court permit the witness to answer, reserving ruling on it.

Mr. Phelps: No objection to that.

Mr. Rank: To speed it up.

The Court: Very well.

Q. (By Mr. Phelps): Do you understand my question? Is the information contained in the affidavit true and correct? A. It is correct.

Q. Is there any other information with respect to conversations or any of your activities during the period of time covered by the affidavit, are there any other activities of which you have knowledge not included in the affidavit?

The Court: That is a pretty difficult question for the witness to answer.

Mr. Phelps: I won't labor it. I will withdraw it. Let the [319] record show I will at this time offer the affidavit of Ernest Harvey, subject to counsel's objection and the reservation of motion to strike.

Mr. Rank: I suggest that it be identified at the present time.

Mr. Phelps: Yes.

Mr. Rank: We are doing this just to shorten the testimony.

The Court: This has to do with the circum-

(Testimony of Ernest G. Harvey.)

stances under which the notices were put up and the area shut off.

Mr. Phelps: That is right, your Honor, and rather than go into it by the witness——

The Court: All right, mark the affidavit.

Mr. Phelps: It is the affidavit of Ernest Harvey attached to the application for injunction, preliminary injunction. It is in the Court's records.

The Court: If the Court concludes that it is material, it will read the affidavit and consider it as evidence. If not, an appropriate ruling will be made later on.

Mr. Rank: Thank you. That is satisfactory.

The Court: I do not think it is necessary to give it a number, is it? It is part of the files.

Mr. Phelps: No, it is part of the files and it has been properly identified, I believe.

Mr. Rank: Yes.

Mr. Phelps: I have no other questions, your Honor, then. [320]

Cross-Examination

By Mr. Rank:

Q. Mr. Harvey, this quarter pole setting that Mr. Phelps talked about, the area around the pole being divided into quarters, just explain how that is done. That is something new to me.

A. Well, when they are logging with a yarder, they can only go so far around the pole and then they have to swing the yarder or the blocks in the

(Testimony of Ernest G. Harvey.)

trees, and so they come so far around and then they have to make a change and go around, and that is called logging more or less in quarters.

Q. In quarter segments; and how do they determine where those quarters start and end? Is it done geographically?

A. That is done by the loggers themselves more or less. It is the easiest, the best and the fastest way to pole logs.

Q. Is it possible that one of those quarters would have both Sage and Ward property on it?

A. Oh, yes.

Q. Just one or two other questions, Mr. Harvey. Did you at any time that you were working on there on behalf of these various people ever have any information, knowledge, or receive any reports as to the quantities of logs removed from the Ward properties, and that were being reported by any of the Wilson companies to the Wards?

Mr. Phelps: I am sorry. I didn't hear the first part of the question. [321]

Mr. Rank: I asked him if he had any knowledge of the quantity of logs being reported by Coast Redwood and the Union Bond & Trust to the Wards.

A. No.

Q. (By Mr. Rank): Was there any information, facts or figures that you had at any time while you were working up there, or any of the information contained in any of the records here from which you could have computed for any month the actual quantity of logs removed from the Ward

(Testimony of Ernest G. Harvey.)

lands? A. No, I don't believe so.

Q. That was because of the Ward combination?

A. The Ward combination.

Mr. Phelps: That calls for an opinion and conclusion, if your Honor please. Don't the records and information speak for themselves. I will object to it on that ground.

The Court: I will overrule the objection.

Q. (By Mr. Rank): I will show you a box of records, and this is for my purpose, Mr. Harvey. Will you look at these? I will withdraw the question.

You have seen the so-called daily master scale sheets that were prepared by Mr. Elliott?

A. I have.

Q. I show you a batch of records that have just been handed to me by counsel. Do those appear to be the master scale sheets that Mr. Elliott was keeping? [322]

A. Yes, they appear to be.

Mr. Rank: That is all.

Mr. Phelps: I had in my haste overlooked one thing I should have asked.

Redirect Examination

By Mr. Phelps:

Q. Mr. Harvey, at any time did you request information from anyone connected with the Union Bond & Trust Company or the Coast Redwood and have such request refused prior to May, 1954?

Mr. Rank: To which we object as being immaterial.

(Testimony of Ernest G. Harvey.)

Mr. Phelps: Let me withdraw it.

Q. Mr. Harvey, the information which you were developing you were sending along currently?

A. Yes.

Q. Did you ever have any instructions from Mr. Fleckner or Mr. French to give them any additional information other than what you were supplying to them? A. Not that I know of.

Q. Did you ever make a written request upon Mr. Elliott or Mr. Nelson for any further information than what he was supplying you?

Mr. Rank: To which we will object as being immaterial.

Mr. Phelps: I think it is very material, your Honor.

Mr. Rank: Mr. Elliott and Mr. Nelson were employees of [323] Coast Redwood, for one thing.

Mr. Phelps: I think it is most material, your Honor, to show if for no other purpose, two things: First, that they were satisfied with the type of information that they were receiving, and secondly, that there was no request for information during this period of time which was refused to them. I think that is material.

Mr. Rank: But you know that is not a fact.

Mr. Phelps: During that period of time, June to October.

Mr. Rank: Oh, June to October.

Mr. Phelps: That is what we are talking about.

The Court: I just do not know what the ques-

(Testimony of Ernest G. Harvey.)

tion means. It is very difficult to rule on that. I just do not know, what you are talking about.

Mr. Phelps: Mr. Rank, can't we stipulate to that as the fact?

Mr. Rank: No, we are not going to stipulate to that as a fact. I do not think it is material at all whether they requested it.

The Court: Do you understand this question? Of course, I am not a lumberman, but I do not know what he means by it.

Mr. Rank: He means did he ask for any more information at any time and was he refused, referring to Coast Redwood employees. My point is it is not material what he asked Coast Redwood employees for or whether he asked anybody or [324] not.

Mr. Phelps: I am referring to anyone from whom he was getting information with respect to the Union Bond & Trust, the very information that he was getting. I am asking did he ever request any information from Mr. Elliott or Mr. Nelson and if such a request was ever refused.

The Court: Let me see if I can understand it.

Q. Certain written information was given to you by these representatives of the Coast Lumber Company, is that right? A. That is right.

Q. Given to you in written form?

A. That is right.

Q. Was the form of that information that was given to you pursuant to some formula that you laid out, or how did that come about? Do I make myself

(Testimony of Ernest G. Harvey.)

clear? How did you get the records from these people?

A. Well, that all came in a kind of roundabout way through my boss, Mr. French. He asked me if I could get that.

Q. You asked them to supply you with these records, is that right? Did you ask these people to furnish you with these records that have been referred to here? A. I asked the scaler, yes.

Q. And then subsequently you got these records?

A. Yes, he said he would have to contact his superiors.

Q. You asked the scaler and the scaler got in contact with his superior and as a result of that you got these records? [325] A. I did.

Q. Did you ask for any other records besides these? A. No, I don't believe I did.

Q. Did you get what you asked for?

A. I got what I asked for.

Mr. Phelps: That is what I have in mind.

Mr. Rank: You will stipulate that those are the records (indicating envelope containing documents)?

Mr. Phelps: Yes, certainly.

Mr. Rank: With the Court's permission, I forgot one thing.

(Testimony of Ernest G. Harvey.)

Recross-Examination

By Mr. Rank:

Q. Mr. Harvey, did you have a conversation with Elliott, the scaler for Coast Redwood, some time back in July, 1953, concerning these daily log haul reports that he was preparing, so-called master scale sheets? A. Yes, I believe I did.

Q. Did that conversation concern the information and the data that he was putting down on the master scale sheets?

A. Yes, I believe it did. [326]

Q. And did that conversation concern the information on the data that he was putting down on the master scale sheets? A. Yes.

Mr. Phelps: When? May we have the time, the occasion?

Mr. Rank: Yes.

Q. (By Mr. Rank): Approximately what was the date?

A. Well, as near as I can remember, I believe it was sometime in the first part of July, 1953.

Q. And is there any record among these papers that you examined that refreshes your memory as to the date? A. Yes, there was.

Q. And what were those records?

A. That was the scale sheets received from Kenneth Elliott.

Q. Who else was present, if anybody, besides Mr. Elliott, if you recall?

(Testimony of Ernest G. Harvey.)

A. Well, at that particular time, I don't recall of anybody being present.

Q. All right. Will you relate the conversation?

Mr. Phelps: I will object to that as hearsay, if your Honor please, not binding on the plaintiff.

Mr. Rank: These are their records and their information that they are talking about here, the information we got and the very person we got it from.

Mr. Phelps: That isn't the proper way—well, I have made my objection. [327]

The Court: Overruled.

The Witness: What was the conversation?

Q. (By Mr. Rank): Yes, what was the conversation.

The Court: He wants you to tell about some conversation with Elliott.

The Witness: Well, I stopped there and I asked if I could get the full scale sheet both from Nelson and Elliott out of the one office, and as I understood that Mr. Elliott handled most all the scale slips, tickets, and he replied that he couldn't give them to me because he had orders not to include Union Bond and Trust scale slips upon this master sheet, so I would have to go to Nelson to get my log tickets from him to make up my weekly reports.

Q. Did he say from whom he received those instructions?

A. No, I don't believe he said who received them from.

(Testimony of Ernest G. Harvey.)

Mr. Rank: That is all.

The Court: That is all.

Q. (By Mr. Phelps): When was this. You said July? All right; I have no other questions.

Mr. Rank: That is all, Mr. Harvey. Thank you.

Mr. Phelps: Mr. Fleckner, please.

STANLEY L. FLECKNER

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing [328] but the truth, testified as follows:

The Clerk: Will you please state your name to the Court.

The Witness: Stanley Lloyd Fleckner.

Direct Examination

By Mr. Phelps:

Q. Mr. Fleckner, your business or occupation, sir?

A. Timber cruiser under the auspices of W. W. French?

Q. Employed by W. W. French?

A. Yes, sir.

Q. And as his employee and in that relationship, did you supervise generally the policing of the Ward and Sage lands and the A. K. Wilson interests?

A. Generally, yes.

Q. Mr. Harvey who has just testified was the man in the woods and you were the man who was compiling the information sent out by him?

(Testimony of Stanley L. Fleckner.)

A. Yes, sir.

Q. You yourself also personally are familiar, however, with the operation? A. Yes, sir.

Q. From time to time, I take it?

A. Yes, sir.

Q. And Mr. Harvey devoted himself exclusively to this [329] policing job in that area, didn't he?

A. Yes, he did.

Q. He didn't do anything else?

A. No, sir.

Q. You did other jobs, whatever your employer called upon you to do with respect to other contracts that he had; is that right? A. Yes, sir.

Q. And you were generally in charge of the office and the correspondence and the reports and the forwarding of them, is that right? A. Yes, sir.

Q. When this information would come in daily, these diaries, they would be first in the original handwriting of Mr. Harvey? A. Yes, sir.

Q. Then you would see that they were typed up on some kind of photostatic paper to make copies?

A. Yes, sir.

Q. And send those copies on to Mr. Ward in Orchard Lake and to Mr. Fletcher in Oakland; is that right? A. That's right, sir.

Q. And that also applies to these monthly scale reports? A. Yes, sir.

Q. With respect to the monthly scale reports, sir, the information contained on the monthly scale reports above the [330] line entitled "grand total

(Testimony of Stanley L. Fleckner.)

for the month'' is information which you got from Mr. Harvey's records; is that correct?

A. That is correct, sir.

Q. You simply took his information and entered it on this form? A. Yes, sir.

Q. Now there is another item below that grand total for the month, and those grand totals for the month are totals that you made? That was your computation? A. Yes, sir.

Q. With respect to that computation, you simply added up the various classifications and came up with mathematical figures representing certain totals of what they were supposed to be?

A. That is correct, sir.

Q. The only way of arriving at that was to add it up mathematically and come out with the total?

A. That is right.

Q. You had no further information at that time, no additional information other than what Mr. Harvey had in the woods, did you?

A. At that time, sir?

Q. Yes, when you made the monthly total?

A. Oh, no; that is all, sir.

Q. Now do you remember an occasion—do you want to look at [331] the map? I wasn't going to ask you about it. I think it has been identified by the other witness.

Mr. Fleckner, do you remember the occasion when you and Mr. French went to the Coast Redwood Company mill on the Samoa Peninsula?

A. Yes, I do.

(Testimony of Stanley L. Fleckner.)

Q. In February of this year?

A. Yes, sir.

Q. And on that occasion you requested the girls in the office to see the stumpage ledger book, did you not, for Coast Redwood?

A. We requested the information and she produced a ledger.

Q. That was for Coast Redwood?

A. Yes, sir.

Q. You had with you certain figures at that time, February 17th or 18th, showing you the monthly amounts reported by Union Bond and Trust Company and the amounts paid on that stumpage?

A. I had the book you just had in your hand, sir.

Q. And you had a letter from Mr. Fletcher giving you figures showing what had been reported?

A. Yes, sir.

Q. And then did you take those figures that you had and compare them with what was shown on the Coast Redwood Company's records on that day? [332]

A. Yes, sir.

Q. How did you do that out of this ledger sheet?

A. I took our totals of the so-called creditor's side or Coast Redwood side and compared them with the totals for the Coast Redwood side, and they checked.

Q. Let's identify this because this is important. When you say that you took your totals of the creditor, you mean the totals under the classifica-

(Testimony of Stanley L. Fleckner.)

tions "creditors" month by month as they appeared in what is known as your scale sheet Ward and Sage-Wilson contract form?

A. That's right. I added up the sub-totals and arrived at sub-grand totals of the creditor in the lower column.

Q. Did you also compare that with the information that you had received from Mr. Fletcher as to the amount paid and reported? A. Yes, sir.

Q. And they corresponded exactly; is that right?

A. Yes, I believe they did.

Q. So that as of that time, February 18, 1954, you then knew that there was a discrepancy between the amount Mr. Fletcher said had been reported and paid for and the amount that had been removed from the land?

A. Well, we assumed that there was something wrong; we didn't know it in that terminology.

Q. You knew that there was a discrepancy, let's put it that [333] way, at that time?

A. Yes, sir.

Q. And that completed your investigation as you have told us? A. Yes, sir.

Q. You didn't do another thing to investigate as to whether or not there was a discrepancy except to compare those records?

A. That is all, sir.

Mr. Rank: You are talking about Mr. Fleckner personally?

Mr. Phelps: Mr. Fleckner personally, of course.

No. 14996

United States
Court of Appeals
for the Ninth Circuit

HAROLD L. WARD, et al.,

Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record
In Three Volumes

Volume II
(Pages 421 to 708)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

Phillips & Van Orden Co., 870 Brannon Street, San Francisco, Calif.—4-6-56

APR 19 1956

PAUL P. O'BRIEN, CLERK

No. 14996

**United States
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HAROLD L. WARD, et al.,

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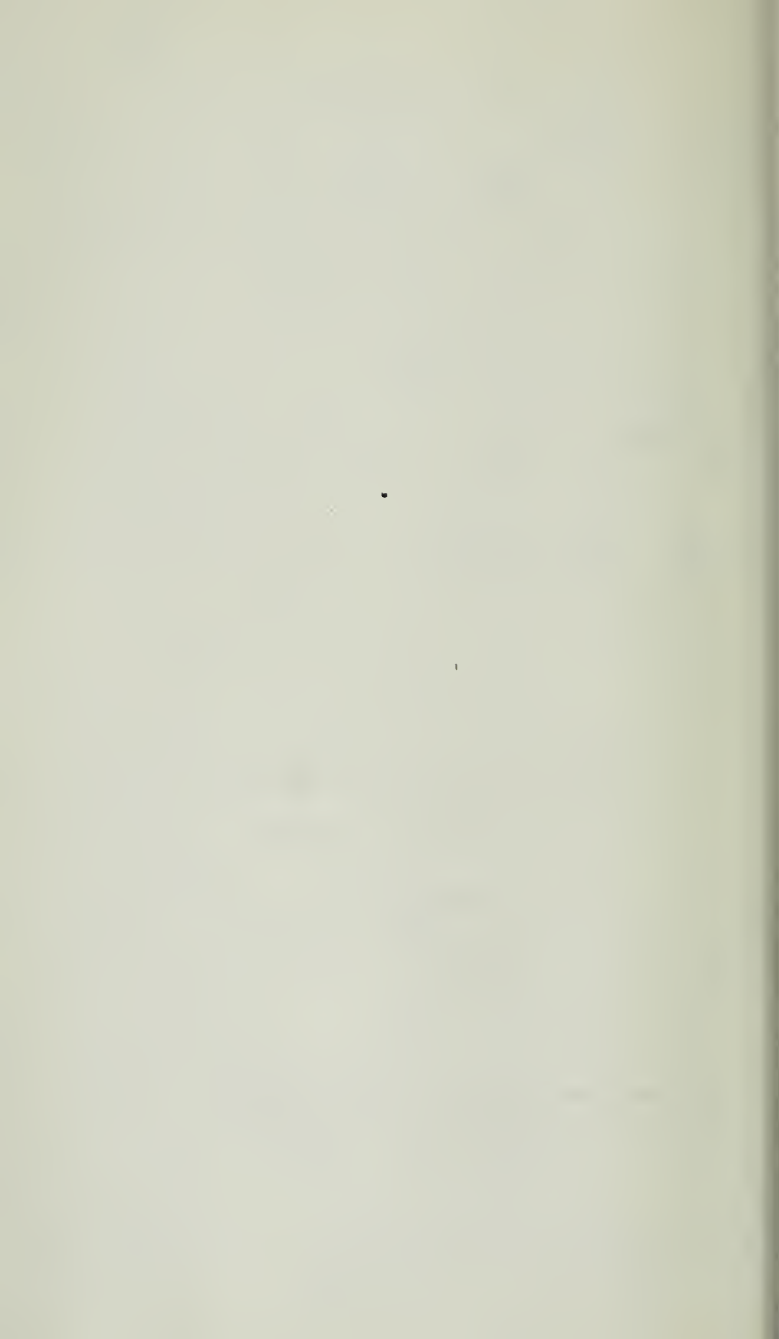
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Southern Division.



(Testimony of Stanley L. Fleckner.)

Q. (By Mr. Phelps): You didn't go to see Mr. Paul Owens at any time, had no conversations with him? A. No, sir.

Q. You never requested Mr. Harvey to supply you with any other information than that with which he was supplying you? A. No, sir.

Q. And you never requested Mr. Harvey to request of anyone connected either with Union Bond and Trust Company or Coast Redwood, any additional information prior to May, 1954?

A. No, sir.

Mr. Phelps: Now in the same manner and method, and for convenience, with respect to the affidavit of S. L. Fleckner attached to the application for an injunction, may I quickly ask you, Mr. Fleckner, you of course are familiar with this affidavit; you have read it? [334]

A. Yes, I have read the affidavit.

Q. Are the matters contained in there true and correct? A. Yes, sir.

Mr. Rank: Well, of course, my same objection will run to anything on that affidavit.

The Court: This also refers to——

Mr. Phelps: To the same matter.

The Court: Of showing the dates?

Mr. Phelps: Yes. I was about to say, may it be stipulated then in the same manner we did before that I am now offering the affidavit of S. L. Fleckner as it appears—it appears in the original files of this action and attached to the application for preliminary injunction? I now offer it and the

(Testimony of Stanley L. Fleckner.)

record can note your objection as to its materiality.

Mr. Rank: Yes.

Mr. Phelps: And your reservation of a motion to strike, the Court reserving its right to determine whether it should be considered or not.

Mr. Rank: Yes.

The Court: All right.

Q. (By Mr. Phelps): Mr. Fleckner, did you at any time—referring to any time during the calendar year 1953—have the cruise figures on these Ward lands in your possession?

A. I am not sure whether we had any in '53 or not. [335]

Q. Let us take the period June to October. Did you have any cruise figures on that land at that time? A. I don't think so, no, sir.

Q. And were asked at any time during that period of time, June to October, to check, or at any time prior to October of '53, to check the figures you were developing with any cruises?

A. No, sir.

Q. Now you said that you were in charge of sending these reports on and the correspondence. Did Mr. Ward, either by correspondence or orally, or by telephone, ever request from you during the calendar year 1953 any additional or different types of reports?

A. You called our attention to a letter, from Mr. Ward, in January, 1953, requesting information

(Testimony of Stanley L. Fleckner.)

which we were in process of compiling.

Q. That letter has been referred to and is in evidence, the letter in which he first initiates the request for checking the amounts being removed from the lands? A. Yes.

Q. And that is the only request you had?

A. We had one from Mr. Fletcher requesting more general information.

Q. More general information?

A. Yes, sir. [336]

Q. That letter also appears in the correspondence of 1953? A. Yes, it does.

Q. I won't take the time to read it, but it has been referred to. And that would be all; is that right? A. Yes, sir.

Mr. Phelps: Thank you. Just a moment. I have no other questions. And I made it by twelve o'clock.

Mr. Rank: Yes, but you didn't leave time for me to get through by twelve. Shall we take our noon recess?

The Court: No, no, finish up.

Cross-Examination

By Mr. Rank:

Q. Mr. Fleckner, at the time that you went to the Coast Redwood Company office under instructions of Mr. Fletcher, you were shown some ledger sheets which apparently were the stumpage records of the Coast Redwood; is that correct?

A. Yes, sir.

Q. And from that you were able to check and see

(Testimony of Stanley L. Fleckner.)

that the information there contained was the same, the same totals as Mr. Fletcher had given you as to the total quantities reported to the Wards?

A. Yes, sir.

Q. I am now showing you Defendant's Exhibit T, and I know you haven't seen this before. These are photostatic copies. [337] Would you look them over and see if that is the same general type of information, the same general type of bookkeeping and entries, that you saw at the Coast Redwood?

The Court: You mean is this the form that was used?

Mr. Rank: Yes, the form that was used.

The Court: The form of keeping the records that was used in the Coast Redwood?

Mr. Rank: Yes, that is what I had in mind. Thank you.

The Witness: About the same size page, about the same type of ledger page, but I don't think it looks quite like the same set of records.

Q. (By Mr. Rank): No, it isn't supposed to be the same set of records, this is **Union Bond and Trust**. A. The same type of system.

Q. Did the pages which you saw contain scale sheet numbers as are shown here, do you recall?

A. No, I don't recall that.

Q. Did it contain the footage?

A. It contained the footage.

Q. And the totals the same as we find here?

A. And the totals.

(Testimony of Stanley L. Fleckner.)

Q. As I recall Mr. Owens' testimony as to that book maintained for Coast Redwood, it showed the loggers' name or the landing number, whereas these show the section number from which they were removed. Do you recall that? [338]

A. Yes, I believe there was more information on the other sheets that appears here.

Q. Mr. Fleckner, I have removed from Plaintiff's Exhibit 8 of the plaintiff's deposition for Identification a sample sheet and ask you if that is the form and the information given to Harvey by Mr. Elliott from which you developed your reports?

A. Yes, it is.

Mr. Rank: I will offer this at this time as a sample.

Mr. Phelps: What is the date of it?

Mr. Rank: This is June 1st to 5th, 1953.

Mr. Phelps: That would not be representative. Union wasn't even logging at that time.

Mr. Rank: I thought you started logging——

Mr. Phelps: Not on that area, no. Your own records show that.

Mr. Rank: I have just given this as an example of the information that was being given.

Mr. Phelps: I think you should give a representative one instead of that.

The Court: Defendant's Exhibit V introduced and filed into evidence.

(Whereupon sheet was marked Defendant's Exhibit V in evidence.)

(Testimony of Stanley L. Fleckner.)

Q. (By Mr. Rank): And that contains all of the information that you received from Coast Redwood or Union Bond and Trust [339] or any of the other companies?

A. We received small stumpage pad scale sheets from Mr. Elliott or Nelson.

Q. That contains the same type of information except sometimes the numbers of the scale sheets?

A. Yes, sir.

Q. What I am getting at, you were given information as to the loads, scale, whether Redwood or fir, and the landing number?

A. Yes, sir.

Q. And it was from that information that you, with your own investigation and own knowledge, developed the reports which you turned over finally to Mr. Ward, California Barrell and Arrow Mill?

A. Yes, sir.

Mr. Phelps: I have one here that I was going to put in.

Mr. Rank: July?

Mr. Phelps: It just happens to be October.

Mr. Rank: What is the date?

Mr. Phelps: October 19th to 23.

Mr. Rank: Let's see. Maybe we can use that. You wanted that as an exhibit?

Mr. Phelps: Yes.

The Clerk: Plaintiff's Exhibit No. 13 introduced and filed into evidence. [340]

(Whereupon, sheet dated October 19-23 was received in evidence and marked Plaintiff's Exhibit 13.)

(Testimony of Stanley L. Fleckner.)

Q. (By Mr. Rank): Mr. Fleckner, at my request, you took a series of aerial photos of these lands, did you not? A. Yes, sir.

Q. Do you recall the date?

A. June 11th, '54.

Q. June 11, 1954 (exhibiting photographs to Mr. Phelps).

I hand you a folder and ask you if you can identify that as a folder of photographs that you took?

A. That is the same folder, Mr. Rank.

Q. The first page has the introduction, album of aerial photographs, description as to how they were taken and other technical information of that type? A. Yes, sir.

Q. The next page is a map of the area, a small map of the Ward lands, and also apparently showing the line of flight and identification numbers from which each photograph was taken?

A. Yes, sir.

Q. In other words, by following the map and referring to the number of the photograph, you can see from what point that photograph was taken?

A. Yes, sir. [341]

Q. Now as I understand, Mr. Fleckner, Photographs 1 to 21, are all of Township 12, that is the logged over area? A. Yes, sir.

Q. And may I amend that question. Photographs 1 to 21, except 14, 15 and 16, are of Township 12 showing the logged over area?

A. That is correct, sir.

(Testimony of Stanley L. Fleckner.)

Q. And photographs 14, 15 and 16 are of the virgin timber in Township 11?

A. That is correct.

Mr. Rank: Did you want to ask the witness any question to explain it to you, as to how they were taken and where?

The Court: Do these photographs of the logged over area, if put together, cover the whole area, or are they only selected places that you photographed?

A. No, they are very general; the map in the front will indicate.

Mr. Rank: I think the Court means if you put them together would it cover the entire area of Township 12?

The Court: Like a panorama photograph that we take part of it at different times, then when you put it all together——

The Witness: Almost, sir. You should find the edge of one picture on the next one.

The Court: It is generally?

The Witness: Generally of the type in the flight strips, [342] yes, sir.

Q. (By Mr. Rank): And the flight strip is marked on the map where the pictures were taken, each point? A. Yes.

Mr. Rank: I will ask that that be marked in evidence as Defendant's Exhibit next in order.

Mr. Phelps: I don't know its materiality, but——

(Testimony of Stanley L. Fleckner.)

The Court: If I get tired of reading the depositions or the evidence, I will look at the photographs.

Mr. Phelps: All right, that is fair enough.

The Clerk: Defendant's Exhibit W introduced and filed in evidence.

(Whereupon aerial photographs were marked and received in evidence as Defendant's Exhibit W.)

Q. (By Mr. Rank): You are familiar generally with that entire area, are you not, Mr. Fleckner?

A. Yes, sir.

Q. In other words, all of the timber and the stands on the south side of the Klamath, that is the south watershed?

A. Yes, sir.

Q. And calling your attention to photographs 14, 15 and 16, that is, of the virgin area, would you say that those photographs are or are not generally representative of the virgin timber in that [343] area?

A. Yes, they are.

Q. And did you see Township 12 before it was logged? When did you first go into Township 12—that is the Ward area?

A. The first time I was near any of the Ward lands in Township 12 was in 1950, the spring of 1950.

Q. And at that time a part of it was virgin and unlogged?

A. Yes, sir, most of it.

Q. Would you say whether or not photographs 14, 15 and 16 are fairly representative of that area, Township 12, that was unlogged at that time?

(Testimony of Stanley L. Fleckner.)

A. Yes, the whole general area, 11, 12 and 13, all on the west side of the Klamath—they are representative pictures of the general area.

Q. Thank you. I will ask you some question, Mr. Fleckner, prior to February 12 or 13th. I selected that date because that is the date that you received the letter from Mr. Fletcher which contained the information as to the quantities of logs that had been reported to Ward. Prior to that date, do you have any information or any knowledge or records of any kind whatsoever showing the quantities of logs that had been reported by the Union Bond and Trust to the Wards? A. No, sir.

Q. During the year 1953, was there any information or data or record that you had in your possession or that you had knowledge of—not that you had knowledge of; that you had in [344] your possession, from which you could compute the total quantity of logs being removed monthly from the Ward lands?

A. No, sir, it wasn't possible by our records.

Mr. Rank: Thank you. That is all.

Redirect Examination

By Mr. Phelps:

Q. On the logged over land, sir, is it pretty representative as to its condition of standing or fallen merchantable timber? Was the whole general area, that is on the Sage "B" lands and the Ward lands about the same—pretty representative?

A. Making a very general statement, I would

(Testimony of Stanley L. Fleckner.)

say they are about the same. They were logged by the same people and with the same mixed time element. Very generally the same.

Q. You have reported that there is 117 million feet of merchantable timber on the Sage "B" lands that have been logged. Do you recall that?

Mr. Rank: We will object to that as being immaterial, what he reported.

Mr. Phelps: This is preliminary. Can you break that down——

Mr. Rank: Just a moment, Mr. Phelps.

The Court: I don't know what this is about now.

Mr. Phelps: This is just to establish this witness' opinion as to the number of feet of merchantable timber that [345] there is on the logged over lands on the Ward and Sage "B" tracts. That is the purpose of it.

The Court: That is a new subject.

Mr. Phelps: Yes, your Honor, but it will be very quick because I just want to ask if it is the same——

The Court: Let him answer.

Q. (By Mr. Phelps): It would average the same as the Sage lands there?

A. The logged over?

Q. The logged over land.

A. Very generally.

Q. That, in your opinion, was the average merchantable timber left per acre on the Ward and Sage "B" lands?

Mr. Rank: We will object to it as being in-

(Testimony of Stanley L. Fleckner.)

competent, irrelevant and immaterial, calls for the conclusion of the witness. He has not shown to have cruised it. I don't know whether he did cruise it or not. [346]

Q. (By Mr. Phelps): You did cruise it, and you know of the 117 million feet figure on the Sage "B" lands, isn't that right?

The Witness: That figure was brought out in the Sage trial. I didn't report it. I think you were the first one who mentioned it.

Q. If I am mistaken, please tell me. Do you have that knowledge or not? If you do not, please say so, and I will drop. A. Specifically?

The Court: How does he have that knowledge?

Q. (By Mr. Phelps): Do you know it of your own knowledge? Have you cruised it? Did you make an estimate? That is all I want to know—under Sage "B"? A. No, sir.

Q. All right. I thought you had.

A. No, no.

The Court: I guess we will let you go now. We will resume the trial at two o'clock.

(Whereupon, an adjournment was taken until the hour of 2:00 o'clock p.m., this date.) [347]

November 24, 1954 at 2 P.M.

CHARLES H. BUNTING

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court, sir.

A. Charles H. Bunting.

Direct Examination

By Mr. Phelps:

Q. And your address, sir? Where do you reside?

A. 2455 Placer Street, Redding, California.

Q. What is your business or occupation?

A. I am a timber cruiser, consulting forester.

Q. In that work is there any recognized educational requirements, or how do you gain your experience in that? Just tell us generally. Do you graduate from a school?

A. I graduated from the University of California with the Degree of Bachelor of Science in Forestry in 1940, and subsequently went to work in the industry. I held a couple of summer jobs while I was going to school, one with the Forest Service as a compassman and topographer, another with the Calgore Lumber Company as assistant to the logging engineer, [348] scaler, and upon graduation I was employed by the Southern Pacific Land Company in the capacity of field agent, as they called the job. Actually it involved cruising timber on their land grant holdings in Siskiyou, Trinity,

(Testimony of Charles H. Bunting.)

Shasta, El Dorado and Placer Counties, and appraising the value thereof.

Q. Does that also have to do with the valuation of timber?

A. Yes, we were required to put the value on the timber and also I worked for the Collins Pine Company.

Q. What is the Collins Pine Company? Where are their operations? What did you do for them?

A. They are a lumber company located in Plumas County, holdings in Plumas and Tehama Counties, approximately sixty to seventy thousand acres, they did have at that time. My job was assistant forester. I cruised timber, marked timber for cutting, ran cutting lines, scaled and installed permanent growth plots. I was there from September, 1944, to July or the end of June, 1945.

Q. What did you do after that?

A. When I left their employment I engaged as a timber cruiser consulting forester to the industry, working in California.

Q. When you say that do you mean that you were self-employed?

A. Self-employed as a freelance timber cruiser and appraiser.

Q. And hiring out to advise and to consult on various timber problems, including valuation?

A. Yes, sir. [349]

Q. Tell us just generally what are the duties or the scope of your present business in a general way relating to timber? What do you do?

(Testimony of Charles H. Bunting.)

A. The bulk of the business in obtaining volumes in timber on pieces of private property, analyzing the access problems, determining the value of the timber, the cost of the logs delivered at the pond. I also handle trespass cases, involving the determination of the volume of timber removed from a tract after the logs are gone, and I make timber stand maps using aerial photographs.

Q. Has any of your work in that general classification included work in the Del Norte-Humboldt County areas? A. Yes, it has.

Q. Can you state whether or not, then, in that connection your work has included redwood and Douglas fir?

A. Yes, it has included redwood and Douglas fir.

Q. Are there any societies to which you professional foresters belong?

A. I am a member in senior standing of the Society of American Foresters.

Q. Mr. Bunting, at our request did you make a study, an examination of the Ward lands—I see they are not all there on this particular map, but I won't take the time to take the other map—you are generally familiar with this area, first of all? [350]

Mr. Rank: Is that a new question?

Mr. Phelps: Yes, because the map does not include the 14-40's. I wanted to ask him about that.

Q. Are you generally familiar with the Ward-Sage lands and the Ward lands? A. Yes.

Q. In Township 12 and Township 11 North,

(Testimony of Charles H. Bunting.)

Range 2 East? A. Yes, I am.

Q. Did you undertake an examination of any part of those lands to determine the quality of the virgin timber?

A. I made a 5 per cent two-run quality cruise on the Ward lands in the southwest quarter of the southwest quarter of Section 2, in the east half of Section 3, also in the northeast quarter of the northwest quarter of 3, and in the northwest quarter of Section 11, Township 11 North, Range 2 East.

Q. Just tell us please what was the purpose, first of all——

The Court: When did you do it?

Q. (By Mr. Phelps): When did you do this, sir?

A. I did that beginning—I can't give you the exact date, but may I say last week. I can if I think of it.

Q. Can you tell us commencing when, and when did your work cease, approximately?

A. Commencing on the 20th.

Mr. Rank: November 20th?

The Witness: Just a moment. Commencing I guess, on the [351] 13th and ceasing on the 19th.

Q. (By Mr. Phelps): Ceasing on the 19th so far as the area is concerned? A. Yes.

Q. After compiling information have you continued to work on it the rest of this week up until today? A. Yes, I have.

Q. What was the purpose? What were you at-

(Testimony of Charles H. Bunting.)

tempting to develop? Without saying what you did at the time, what were you attempting to develop?

The Court: Let us not waste time on this. Is this man going to testify as to the value of that property as it was when he saw it?

Mr. Phelps: Yes, he will.

The Court: Just ask him that question.

Mr. Rank: Well——

The Court: Then counsel can object to it and if there is an issue on it, he can raise it. I do not listen to a lot of business about what an expert tells me with respect to every step he takes in doing it. If the other side wants to cross-examine on it, they can. I do the same thing with doctors. You are familiar with that, Mr. Phelps.

Mr. Phelps: That is true, your Honor. I had not thought of it. I certainly will.

The Court: Ask him that question. If it is a question [352] of valuation, ask the question and counsel can object to it.

Q. (By Mr. Phelps): I will ask it then in this fashion: As a result of your investigation, study and examination of the virgin timber standing on the 14 forties, do you have an opinion, sir, as to its value? A. Yes, I do.

Mr. Rank: Just a moment, please. To which we will object as being incompetent, irrelevant and immaterial and calling for the conclusion of this witness. We have two thoughts in mind, of course: one is the materiality of the value and the other is the qualifications of this witness, and on that

(Testimony of Charles H. Bunting.)

matter we would like to ask one or two questions, but we urge the objection of materiality.

The Court: That is the only objection I would be interested in. What is the basis of that?

Mr. Rank: Materiality?

The Court: Yes.

Mr. Rank: The basis of that is this, your Honor. Principally it is this: Number 1, that in the event it should be found that the defaults were excusable, then the plaintiff may be entitled to reinstatement in the property. In the event the defaults are found to be caused as a result of bad faith or unconscionable conduct, fraudulent conduct, then there can be no recovery on the plaintiff's part.

The third is the question of wilfullness. In the event [353] that the defaults are found to be wilful, that is, voluntary, under the theory of wilfullness as distinguished from fraudulent or bad faith, then the question of valuation is only material insofar as it is necessary to determine whether or not the vendor has been damaged, and then the question of materiality is whether or not the value of the property is less than the balance due under the contract.

Now, I appreciate that at this moment there is no stipulation as to the value of the property. However, the Court is aware of the fact that I am prepared to stipulate that the value of the property is as much as the remainder due on the contract. So that is the basis of my objection. That was the basis,

(Testimony of Charles H. Bunting.)

of course, of my stipulation at the time of the pre-trial conference.

The Court: Isn't there also a question that might be material on the over-all equitable picture in attempting, as I said, the other day, to mold a decree that would be just under the circumstances, that the question of unjust enrichment might come into it?

For example, if it appeared, for example, it is stipulated that the property is worth at least \$160,000——

Mr. Rank: \$164,000.

The Court: If it appeared, for example, that the property as it now stands is worth six or seven hundred thousand dollars—— [354]

Mr. Rank: Yes.

The Court: That might be of some equitable significance if the Court were attempting to impose conditions either upon the reinvestment of the vendee with his contractual rights, or in the event of the deprivation of those rights. It seems to me—and I am only speaking offhand here—that in an equity case such as this that the limitation should not be necessarily as narrow as that of limiting it to merely whether or not the vendor has been damaged. It might be a factor that might enter into the determination of the conditions or proper equitable boundaries that might be put in the decree, depending on which way it would go.

Mr. Rank: I think not, your Honor. I think all the defaulting vendee is entitled to at the very best is to be made whole. In other words, that is

(Testimony of Charles H. Bunting.)

really the meaning of the phrase "punitive damages." In other words, he is not expected to be punished by way of exemplary or punitive damages. All he is entitled to is to be made whole, and the value of the property has no bearing on that question. The question of making him whole is that he shall not lose any money; that he shall have returned to him all or part of his down payment if the circumstances warrant it.

The Court: That is wholly true.

Mr. Rank: I have never heard of a case otherwise.

The Court: If the vendee under California law is in [355] default on a number of payments under a contract and the judge feels kindly to him and says, "Well, maybe there is some neglect or failure on your part; I am going to reinstate you" that he is under burdens conditioned upon the granting of that equitable relief.

Mr. Rank: Oh, if he is reinstating him in the contract, that is a different proposition. In other words, if he is to be reinstated in the contract he can be reinstated upon the conditions that the court might determine.

The Court: So if the court were to come to a conclusion in the case—not necessarily here——

Mr. Rank: Yes, I understand.

The Court: Supposing the court were to come to the conclusion here, wouldn't the value of the property, particularly in the case of a contract that is paid for by way of royalties as this is, maybe

(Testimony of Charles H. Bunting.)

be of some help or be of some value in the determining of the nature of the conditions to be imposed.

Mr. Rank: I don't like to argue against myself on a point that may come up, but I don't think the law is that way. Let us assume that the Court, as you stated, felt kindly towards the vendee and felt that the defaults were not wilful or was going to reinstate him in the contract, I think that the Court could go no better than saying to the vendee, "You pay the balance due on the contract with interest and [356] all the costs that you have caused this person, plus the legal expenses," and so on and so forth. I don't think the Court could say, "There is a melon here. I am going to put this vendee in, and I am going to give you, Mr. Injured Vendor, a part of that melon." I really don't think the cases hold that, although it may be that subsequent developments in this case would want to make me argue that way. But I don't think the cases hold that.

The Court: Couldn't the Court impose a condition, for example, that would require that as a condition to reinstatement some reformation in the contract be had between the parties?

Mr. Rank: I know of no cases that hold that.

The Court: Inasmuch as you folks have gotten yourselves in this involved situation, maybe we will establish a precedent, we will do something. I don't think the California law puts any precise limitation. These cases that I have read that you have cited

(Testimony of Charles H. Bunting.)

are pretty general in their nature and they set down some general rules.

Mr. Rank: Are any of those cases handy in your library? I might read just some language to you.

The Court: I have read those cases already. I realize what the language is, and I know I am bound by the California law, but I don't think it is so restricted as all that. For example, take the other side of the picture: If it were to appear that the value of the property as it stands now [357] is approximately equivalent to the unpaid purchase price, the value of the land, we are not concerned with that. But let us suppose that the land is worth six or seven hundred thousand dollars more——

Mr. Rank: Yes.

The Court: And let us suppose that the Court finds that there was an unintentional default here.

Mr. Rank: Yes.

The Court: Under those circumstances the value of the property might have some bearing on the equitable solution of the rights of the parties.

Mr. Rank: I don't believe so, your Honor. I don't think that a defaulting vendee can profit by his wrong.

The Court: He can have conditions imposed and the value of the property might have something to do with it.

Mr. Rank: I don't believe so. I think it is the amount that he puts in the contract is what he is entitled to in order to be made whole.

The Court: That may be true in the case of the

(Testimony of Charles H. Bunting.)

ordinary contract for the sale of land, but here you have a peculiar obligation where the vendee uses a part of the proceeds for the purpose of paying the purchase price as in oil and timber cutting contracts.

Mr. Rank: Yes.

The Court: And I think there is a somewhat different [358] situation. Only one of those cases that you cited was a timber cutting case.

Mr. Rank: The Crowfoot case.

The Court: Only one was a timber case. The others were just straight land purchase contracts, and no judge would have too much difficulty with the ordinary case of purchase and sale of land on the installment plan.

Mr. Rank: I would think that the rule would be more liberal towards the timber case where the land was depleted than the other way.

The Court: Let me say this, Mr. Rank. I think we are debating an academic question. There is no jury in attendance. If after submission of the case the Court decides that the value of the land does not play any part in it, it won't be considered; but it is much easier to just take the testimony and then leave it go at that. If it is not legally admissible, I don't want to spend too much time listening to argument to a great extent on that now if it can be deferred. The fact that I hear the testimony is not going to make any difference.

Mr. Rank: I appreciate that.

The Court: Because I have to determine even-

(Testimony of Charles H. Bunting.)

tually whether or not it legally plays a part in the decision of the case just like any other part of the evidence.

Mr. Rank: I appreciate that.

The Court: It doesn't make any difference. I think it [359] might be just as well to take the testimony and reserve ruling on the motion to strike.

Mr. Rank: Yes. And the objection on the ground of materiality——

The Court: Furthermore, in view of the way the case has been presented, I haven't got the whole picture of the case yet, and therefore I don't know precisely yet how important to determining the case is this testimony as to value.

Mr. Rank: That is right. We are going around in a very strange circle. May I ask the witness a few questions?

The Court: I don't mean to be critical in that regard. You needn't take this down, Mr. Reporter. This is off the record.

(Discussion off the record.)

The Court: This is on the record. I think that in order to keep the record straight, the Court will rule that the testimony as to value will be taken subject to a motion to strike, and whether or not the testimony will be considered by the Court will be determined when the case is decided.

Mr. Rank: Yes.

The Court: With an opportunity to counsel, of course, to present their views on it.

(Testimony of Charles H. Bunting.)

Mr. Rank: Yes. I might ask the witness a few questions.

The Court: As to qualifications? [360]

Mr. Rank: As to qualifications, yes.

Q. Mr. Bunting, I understand since when, what year you have been an independent cruiser?

A. 1945.

Q. Your office is where? A. In Redding.

Q. In Redding, California? A. Yes.

Q. You say you have done some work in Del Norte and Humboldt Counties? A. Yes.

Q. Can you name a few of the people that you have done work for?

A. Fisher Lumber Company, Willow Creek.

Q. Where are their holdings?

A. Their holdings are in and about Willow Creek, down the river toward Hoopa.

Q. Who else?

A. United States Plywood Corporation.

Q. And where are their holdings?

A. I assisted in checking the Benham tract.

Q. Which tract? A. Behman.

Q. Where is that?

A. That is adjacent to Pecwan Drainage. [361]

Q. Over in the Pecwan Drainage area?

A. I also assisted in checking over a number of holdings of the Spaulding Lumber Company.

Q. Where is that?

A. That is in the Pecwan Drainage.

Q. Where?

A. Trinity county, in the Salyer area, which is

(Testimony of Charles H. Bunting.)

at least geographically a part of the same region.
Portions of the Magnolia tract.

Q. Where is that?

A. In Del Norte County—let me see, I believe that is over the divide from the Pecwan Drainage.

Q. Which way over the divide?

A. Northwestward.

Q. All right.

A. In 1950 I cruised two half-sections of the Ward Timber Company in Walker Creek for an interested purchaser.

Q. In the Walker Creek area?

A. Walker Creek, just south of Klamath.

Q. And who was the interested purchaser?

A. A gentleman named Warren Wood, and P. H. McDonald.

Q. And where else, Mr. Bunting?

A. I cruised cut-over and virgin for the Sage Land & Lumber Company last spring. However, that was in Mendocino County, but it was redwood and fir. [362]

Q. Mendocino County. Which holding is that?

A. In the Booneville District.

Q. Booneville District? A. Yes.

Q. All right. Where else?

A. I believe that is about it.

Q. All right. Now for Fisher Lumber Company over in Willow Creek; what did you do for them?

A. I checked a half section in the Salyer District on the north side of the Trinity River.

Q. For what purpose?

(Testimony of Charles H. Bunting.)

A. Cruising it for acquisition, it was a cruise—acquisition.

Q. That is all fir over there, isn't it?

A. Yes, that is all fir.

Q. The U. S. Plywood Corporation, Benham tract, what did you do for them, cruise?

A. Cruise—that was spot.

Q. That is all fir? A. All fir.

Q. For the Spaulding Lumber Company in Pecwan, what did you do there?

A. Fir and pine.

Q. Fir and pine, and that was straight cruising?

A. Yes.

Q. That is correct? [363] A. Yes.

Q. And over in the Salyer area, that was straight cruising. A. Straight cruising.

Q. That is all fir and pine also, correct?

A. Correct.

Q. The Magnolia tract?

A. Fir and redwood, some pine.

Q. Straight cruising? A. Spot check.

Q. That area is on the fringe of the redwood?

A. Yes, it is.

Q. And what did you find, about 20 per cent redwood in that area?

A. There was, yes, in one unit.

Q. Twenty per cent redwood and the balance fir?

A. Yes.

Q. How large a tract was in the Magnolia tract?

A. As I recall, about 38,000 acres; I couldn't say for sure that figure.

(Testimony of Charles H. Bunting.)

Q. How much of it did you cruise?

A. Only a small percentage, because I was associated with the Plywood Cruisers.

Q. And it was a spot check to determine——

A. Over-all volumes.

Q. You were checking for fir for plywood purposes?

A. Fir and pine for plywood purposes. It was on the block so [364] the redwood had to be checked also.

Q. The next was two half-sections for the Ward Timber Company on Walker Creek. That is principally redwood, isn't it?

A. Principally redwood.

Q. And the next was cut-over and virgin lands in Mendocino; that was a straight cruise?

A. A straight cruise, principally redwood.

Q. And that constitutes your experience in the last nine years? A. Since 1945.

Mr. Rank: We submit, your Honor, that this witness hasn't shown any experience or knowledge or actual experience in the valuation. He has been a straight cruiser estimating the quantity of timber.

The Court: Well, I don't know; you might ask him more questions. [365]

Mr. Phelps: As long as counsel has questioned it, I will go further.

Q. (By Mr. Phelps): Counsel simply asked you, as I understand it, sir, about the places you cruised in Del Norte and Humboldt counties?

A. That is correct.

(Testimony of Charles H. Bunting.)

Q. Is that what you listed? A. Yes.

Mr. Rank: That is not correct. I asked him what he cruised in the last nine years that he has been an independent cruiser.

Mr. Phelps: Certainly I didn't understand the question that way.

Q. (By Mr. Phelps): Did you understand the question that way?

A. As I recall he wound up in the last question with the question being phrased the last nine years.

Q. What is the situation? You tell us. Where else had you cruised generally since you have become, first since 1945, you became a timber cruiser for yourself? Where else?

A. I cruised fir in the Happy Camp District, and pine and determined from the cruise—it was a quality cruise—I determined for—it was Federal timber—determined for the prospective purchaser what the value of the timber was to him, and determined the average selling price of the finished product, what the logging costs were, approximated the [366] manufacturing costs and determined for him what the conversion value would be, and therefore how far he could go in betting his margin, as it were, competing with other timber owners in buying that timber. I did that this year.

I have done the same thing in a number of places. I made an examination of the 150 odd million feet of timber which is now advertised for sale in the Upper South Fork of the Trinity River on behalf of the United States Plywood Corporation, and that

(Testimony of Charles H. Bunting.)

involved the same techniques of valuation. They wanted to know what the costs would be to get timber to their plant, what the access costs would be, what would be the value of the finished lumber products in that portion of the timber that would make only lumber and what they could afford to pay for it.

I have also handled a number of jobs like that for the Big Steel Box Company in Fresno, Tulare County, and I cruised the first property involving 68,000 acres for a prospective purchaser, and he also wanted to know what he could afford to pay for the timber either in a block or by the unit on a pay-as-you-go basis. That involved getting the quantity of timber, the ownership, as well as an expression of the quality of the timber, the grade of the recovery there, the cost of getting it to mill-site, and what he could afford to pay for it in dollars per thousand in each species.

Q. Anything else? [367]

A. I also handled a similar job for the Shasta Box Company of Redding, involving a salvage proposition—that was advertised as a salvage proposition, but on careful examination we found out that only about 15 per cent of the timber was actually damaged. I gave them a set of figures as to the volume and as to the value per thousand of the timber, what they could afford to pay for it, and they used that twice: First in making their bid to the Southern Pacific Company—it was Southern Pacific timber—and subsequently, about three years

(Testimony of Charles H. Bunting.)

later, in satisfying the Bureau of Internal Revenue that their stumpage rates that they were charging off for that timber were justifiable. The Bureau of Internal Revenue held it was not because it was fire damaged timber, and their report was right there that only 15 per cent was fire damaged, and it had a value to them of some \$25 a thousand stumpage rate.

Q. Have you ever appeared as a witness before and testified with respect to valuations of timber or cruising?

Mr. Rank: To which we will object as incompetent, irrelevant and immaterial to that question.

Mr. Phelps: Your Honor, the qualifications of the witness have been questioned. I was shortening it.

The Court: I am wondering whether or not you have the right concept as to values? I am a little bit in doubt as to whether or not this gentleman, qualified as he may be in his [368] work, is able to talk on market value. Market value has a different concept. If value is of materiality, it is only what, under the general concept, a willing buyer would pay to a willing seller of this particular land, situated as it was at the time at which you are talking about value. Wouldn't that kind of testimony have to come from men who deal in properties of this kind rather than a technical man who estimates the quantities involved and that sort of thing? All he does is he figures out the quantities and then he goes and gets the costs, or he knows

(Testimony of Charles H. Bunting.)

the costs of cutting, transportation to the mill, and so forth and so on. But that is not the concept of market value that we have to go by. I think it is purely a question of what a person who has had experience in buying and selling lands of this kind knows what a willing buyer would pay on the market for this sort of thing.

You can introduce testimony of a different kind if it can be shown that there is no such thing as market value. Sometimes that happens in connection with articles that have intrinsic value, not generally dealt in, but I think timberland is no different from oil land or any other kind of land where the mineral or timber or other rights are valuable. You have to find out what people pay for it on the market. This man might be qualified, maybe he has dealt in timberlands, bought and sold them or is familiar with them or, rather, their market value; otherwise I do not think he would be qualified unless you [369] could qualify him further.

Mr. Phelps: I think there is an explanation. Perhaps I do not understand your Honor's point, but your Honor will understand that, first of all, I was going into the various elements that made it up. I was first intending to show the quality of the timber there that this man can certainly testify to. I was going to apply the elements one by one and finally ask him the value. And, of course, only at that point would we reach that. But your Honor

(Testimony of Charles H. Bunting.)

suggested that I cut across all of that and come to the ultimate question only, so that it was more or less your Honor's suggestion that I——

The Court: Maybe this witness can be qualified. I do not know. I am not attempting to cut your examination off, but I do not think that that is the kind of testimony that is of any value here, because all that would be of materiality would be this land and the condition that it is now in. What is it worth? What would a willing buyer pay for it? That is all.

Mr. Phelps: I, with deference, cannot agree with that. But let me explain my position as I understand it.

The Court: All right.

Mr. Phelps: Timberland is distinct in this respect from normal land. Just like oil land in that respect. But bare land is not the consideration. The consideration is the timber upon it. Now, timber has a value, first with reference to its quality. This man could testify as to that, as to its [370] accessibility, as to the cost of removing, as to the cost, in other words, of harvesting it, and finally it develops down to what the market value of the end product is——

The Court: No.

Mr. Phelps: And that is my concept of the valuation.

The Court: No, you will find plenty of decisions in the Ninth Circuit in condemnation cases on that. That is an erroneous concept. It is not what the

(Testimony of Charles H. Bunting.)

finished product or what the value of the product is or what the value of the business is that counts in values of property at sale or upon condemnation. It is only what a willing buyer would pay for it as is, that is all, just as your client went in and signed a contract to pay \$750,000 for this property. He could have paid the whole \$750,000 down and the property was his. That was the value. If that was a fair price for the property at that time, then that was the value of the property at that time. It has nothing to do with how much it cost to cut down the timber or what the timber is worth after you get it to the mill and when you sell it.

You look at the Easter Hill case. I can give you the citation. In that case this whole matter was gone into. It was a piece of land that had on it rock. It was quarryland. The question was: What is the proper way to evaluate that land? There there was the same attempts made to put on a man to testify as to how much it cost to take the rock out and get [371] it to the market, and what could be realized from the sale of the rock after that. But that is not the criterion and the basis for values under those conditions. It is what the person would pay for it as is at that time.

Now, these other considerations enter into it, but the only question is, what would, in the open market, a willing buyer, willing to buy, pay for that piece of property with the timber on it. The same things is true in oil valuations. I have had a number of those cases. There is nothing new about that

(Testimony of Charles H. Bunting.)

principle. You value oil lands upon the basis of what a willing buyer would pay for the land with whatever the evidence shows is the reserve of oil involved. There is a different schedule in evaluating oil royalties themselves, that is, the right to receive a part of the proceeds. There you have to find out what the proceeds are, and then with the record of what they are, that is what the production is. Then you have to estimate the value on the basis of the present value of the future returns.

But here you haven't anything like that. You just have a piece of land that has so much timber on it now in such a such a condition. What is it worth?

I am afraid that I would have to rule against you on that as to what the standard is by which you determine the value of the property. Maybe this witness can be qualified. He may have had dealings. [372]

Mr. Phelps: Yes, I was going to suggest that I do that. Does your Honor recognize any distinction as to the evidence admissible to determine value in a condemnation suit as distinguished from an action of this kind?

The Court: Oh, it is all the same thing. There is no difference. You have to evaluate the property, that is all. What is it worth?

Mr. Phelps: That may be one of our basic differences, and during the recess I think I can put my hands on a case involving the DelMonte lands.

The Court: Let me ask you this question: This

(Testimony of Charles H. Bunting.)

witness is going to testify what? That the whole piece of land was worth so much money and he calculated it on the basis of so many feet of material at such a price that could be recovered from it?

Mr. Phelps: I could show you his report and you could see how it is made up, and I can show it to Mr. Rank.

The Court: How does the witness answer the question as to what this property would bring in the open market?

Mr. Phelps: In the first place, I am sure the witness can qualify further that he first represented buyers.

Mr. Rank: Let him testify to that and not put ideas in his mouth.

The Court: If you want to go into his qualifications further, go right ahead. [373]

Q. (By Mr. Phelps): Mr. Bunting, will you explain to the Court what experience you have had in representing buyers or sellers of timber and making recommendations with reference to price, as to what it is worth, and relating that to the actual market value or salability of those properties? Just tell the Court that.

Mr. Rank: If any.

Mr. Phelps: Yes, certainly.

The Witness: Yes, I have been asked by a number of operators to tell them what timber or logs on the property were worth, and it was generally necessary to ascertain the price at which they

(Testimony of Charles H. Bunting.)

could purchase the material to put the product on the market profitably.

Q. In that experience will you state whether or not you have followed that up to determine in those circumstances the market——

Mr. Rank: Just a minute, Mr. Phelps. I do not like to make an objection, but I can't stand by without objecting to such obvious leading and suggestive questions, I mean putting the thought and answer right in the witness' mouth.

The Court: Let me see if I can't help out. I have had dozens of these cases involving valuation.

The Court: Have you actually had any experience in handling the sale of timberlands?

The Witness: Not in actually negotiating the sale, but I [374] have been asked what the going rate would be.

Q. You have been consulted by people who have themselves engaged in the business of buying land?

A. Yes, I have.

Q. To get your expert opinion concerning the amount of timber on the land, the kind of timber?

A. The amount, the kind and what is it worth?

Q. The factors that would be involved in the cutting of the timber and getting it to the mill and so forth? A. Yes.

Q. And what those various procedures would cost under the circumstances? A. Yes, sir.

Q. Considering the location of the property and the access roads, and so forth?

(Testimony of Charles H. Bunting.)

A. You mean the cost of the access road and the ultimate cost?

Q. The cost of the facilities that would be needed to operate it? A. Yes.

Q. As a result of that sort of that sort of employment, you have gone in and conducted investigations as to the quantity of the timber, the kind of timber, how much it is going to cost to move it out at different stages, how much it is going it is going to cost to cut it and get it to the mill, and you [375] furnished those figures to the man who was interested in buying property?

A. Yes, your Honor.

Q. And then he determined whether or not he could make a profitable go of buying the property on the basis of your estimate? A. Yes, sir.

The Court: I am afraid your witness is not qualified as to market value. He is a technician. He is the man that anybody would employ who is interested——

Mr. Rank: To see if he could pay the market value.

The Court: He is well qualified from his qualifications as one whom anyone who is interested in buying property would employ to give him technical advice as to the kind of timber involved and how much it would cost to do this, that or the other thing, and then the man who was going to buy it would probably have to determine whether or not, if he did it on that basis, whether or not he would have a market in which to dispose of it on a basis

(Testimony of Charles H. Bunting.)

that would warrant his going into the deal. But that is not the kind of testimony that establishes market value. You have to have somebody here who has had experience or keeps track, as an expert, that deals in transactions, the prices that are being paid for that kind of timberland under the circumstances.

Mr. Phelps: Have you followed the market value of [376] stumpage in instances where you have made your investigations?

Mr. Rank: To which we will object as being immaterial in view of the witnesses' testimony already.

The Court: I think this witness, Mr. Phelps, is a well-qualified technician, a technical man in the field, but I do not think he is the man who makes the transactions. It requires a different kind of knowledge.

Mr. Rank: He is the man, if the Court please, that the lumber operator, such as U. S. Plywood, employs to tell them whether or not they can afford to pay what the market value is of that timber. That is the type of man he is.

The Court: And probably well qualified, but he is not an expert on market values, because that is something that the man who is in the business, who has the qualifications, who knows what the conditions are can determine whether he can favorably dispose of the material and where he can dispose of it and all the factors that go to determining whether it is worthwhile to pay the price for the

(Testimony of Charles H. Bunting.)

property or not. That is the sort of man that knows market values.

Mr. Phelps: We will approach it piecemeal then.

The Court: You said you had some other witnesses on market value, or do you have only the one witness?

Mr. Phelps: No, I have others, but it is for the other area.

The Court: Are they also the same type? [377]

Mr. Phelps: Generally the same type. I can follow it up with what your Honor may have in mind, I am sure, but I have not that witness here. But what I will have to do now is ascertain from this witness at the moment what type of timber it is so I can base a hypothetical question to the type of witness you have in mind. In other words, here is the man who made the survey.

The Court: I see no objection to the witness testifying as to what his examination was as to the kind and amount of timber there.

Mr. Rank: I may have an objection to that. I have a very good objection to that from the witness' testimony already. He is not qualified to give a quality study on redwood timber. May I point that out, your Honor? It is well known that redwood timber is a species in and of itself. This man's entire experience, except for a very, very small activity, has been in fir and pine. It has been over in the Shasta area, the Trinity area and El Dorado County, and that is all fir and pine. The quality is different, the determination of the quality is

(Testimony of Charles H. Bunting.)

different. It is entirely a different field. It takes a redwood expert, an old timer like Bill French to go in, not somebody who has been in once or twice. I think two half-sections he cruised that had redwood in it, and then made a spot-check on another area, a very small area that was 20 per cent redwood, and those were [378] not for valuation purposes. But he is not qualified to testify as to the quality of a redwood stand of timber.

Mr. Phelps: Suppose you let me ask a question so you can make an objection.

Mr. Rank: All right. May my argument go to my objection, then? I do not want to repeat all of that.

Q. (By Mr. Phelps): Confining yourself for the moment to your efforts in those 14-40's, those are the virgin 40's of the Ward lands?

A. Yes.

Q. Will you tell us what kind of cruise you did through that area?

A. I made a five per cent two-run quality cruise of the redwood and the Douglas fir. Cruising fir I employed the log rating rules of the Northern California Log Scaling Bureau.

Q. Before we come to the various scales, to meet Mr. Rank's thinking, will you tell us how you did that? How do you assure yourself that you get a representative valuation?

A. Well, a sample consists of circular quarter-acre plots, and they are graded equidistant over the entire ownership so the good is sampled with the

(Testimony of Charles H. Bunting.)

poor. All the trees within the circular quarter-acre plot which are merchantable are graded log by log, the fir and the redwood. [379]

Q. With respect to Douglas fir, what method did you use to classify by quality the Douglas fir?

A. I graded the logs according to free-peeler grades.

Q. What is that? Tell us what that is?

A. The logs are divided into No. 1 peelers, No. 2 peelers and No. 3, a No. 1 peeler being 90 per cent surface clear and greater, 30 inches in diameter at the small end, and certain other qualifications as well. A No. 2 peeler must be 75 per cent surface clear, in length or circumference. A No. 3 is any type of log suitable for the production of veneers, making cores, permitting a certain number of knots, not to exceed an inch and a half in diameter. And there were three sawlog grades consisting of No. 2 sawlogs, No. 3 sawlogs, and so-called rough cuts.

Q. In per cent by volume, what did you find as the result of your investigation in that area with respect to each of those classifications?

Mr. Rank: Are you confining your question now to Douglas fir?

Mr. Phelps: Yes, I will come to redwood in a minute.

Mr. Rank: All right.

Q. (By Mr. Phelps): Will you give us the result of those findings percentagewise and by volume?

A. No. 1 peelers comprised 20.7 per cent of the

(Testimony of Charles H. Bunting.)

sample volume, No. 2 peelers 21.1 per cent, No. 3's 14.4. All sawlogs included [380] 43.8 per cent of the volume.

Mr. Phelps: I am going to leave the question of valuation, but I do want to make a record on it later, your Honor.

Q. (By Mr. Phelps): With respect to the evaluation of the quality of redwood, what method did you use there?

A. I used the three-log grading system devised by the United States Forest Service in their Humboldt Mill Scale Study, which they did for timber sales on Six Rivers National Forest.

Q. What is that method devised by the U. S. Forest Service?

Mr. Rank: Do you mean the detail of it?

Mr. Phelps: Just a general description. [381]

A. They break the logs in three grades. Number 1's must be in excess of 30 inches and 90 per cent surface clear. If they are less than 30 inches in diameter at the small end they must be absolutely surface clear.

I should say those in excess of 30 inches are allowed a single through knot in the clear zone, or a pair of sap knots, and in the last foot above 19 feet any number of knots are allowed.

Number 2 logs must be 75 per cent clear, either as to length or circumference.

Number 3's must be 50 per cent clear. There is also another classification in here, Number 2's. They are allowed to have a number of knots scattered

(Testimony of Charles H. Bunting.)

throughout all sides equal to the diameter of the log at the small end divided by eight, which is a peculiar system, but what it amounts to—it results in surface cuttings throughout the surface of the log which are 10 feet long, eight inches or more in width, and aggregate 75 per cent surface clear.

Q. Using that classification what were your findings as to the percentage of redwood that fell within each of those grades 1, 2 and 3, as you have just described them?

Mr. Rank: If the Court please, may we cross-examine the witness as to his qualifications with respect to grading of redwood?

The Court: I think you had better reserve your examination [382] on that because this is something that he says he found there.

Mr. Rank: The question is as to his ability to find it. I am very serious about this, your Honor. A man who is experienced in fir and pine can't just come along into a redwood forest and necessarily make a quality cruise. He really cannot. I would like to ask the witness a few questions about that.

Mr. Phelps: Doesn't that go to the weight of the evidence?

Mr. Rank: No.

The Court: Have you had any other experience in redwood cruising?

A. Yes, your Honor, in connection with the Sage Land & Lumber Company I made a similar quality cruise.

(Testimony of Charles H. Bunting.)

Mr. Rank: It was a logged-over area in Mendocino County. It was not up in this county.

The Court: Any place else?

A. There was virgin timber on that Sage job also.

Q. (By Mr. Rank): Do you mind if I see your Forest Service document? What he has read from, if the Court please, as I gather—I misunderstood. I thought you had the Forest Service rules in front of you.

Q. Will you show me what you read from when you were testifying as to the redwood?

A. The first page. (Handing a document to Mr. Rank.)

Mr. Rank: What he read from, if the Court please, was [383] Lumber Grade Recovery for Redwood Logs, log grades used. Now, he is not about to testify as to the quality of logs. He is about to testify as to what quality of logs might be found in the standing trees. There is a lot of difference. In other words, on his Douglas fir he is all right. In other words, he has had experience with Douglas fir, and an experienced Douglas fir cruiser can go through a fir area and make a pretty good distinction as to Number 1, 2 and 3 peelers, saw logs and so forth.

Mr. Phelps: Are you testifying as an expert here, Mr. Rank?

Mr. Rank: I am trying to point out to the Court that my objection I think is sound. But to go through a redwood forest without considerable ex-

(Testimony of Charles H. Bunting.)

perience and give a quality study as to the quality of logs that will come out of standing trees, a study made in a three or four-day period as he did, a man has to have considerable experience and many years experience in that. I submit, your Honor, that he is not qualified to give a quality cruise. He can give a quantity cruise maybe, but not a quality cruise.

In other words, he can tell how many trees are there and the gross footage, but it is well known that one of the big faults of redwood is the hidden defects that are not apparent on the outside. That is why we have what he call the Humbolt scale. It takes the gross footage and there is an automatic deduction [384] of 30 per cent for hidden defects. It takes a man with redwood ability to make a quality cruise, not a man who has had experience in fir and in Mendocino County, where he graded redwood before but spends the rest of his time cruising in fir and pine. There are lots of cruisers up there who could do that. Why they didn't get somebody who is experienced I do not know, but that is the true situation. And I think this witness himself would so testify. I do not think he would qualify himself as an expert, as a quality cruiser of redwood in that county. [385]

Q. How about it, Mr. Bunting?

A. I would say that the grading rules are pretty well spelled out and that with experience in picking out grades of standing timber through recognized surface characteristics I would be able to do so,

(Testimony of Charles H. Bunting.)

particularly if I had the benefit of an area where the timber was down closely adjacent to the area under study, as I did.

Q. In other words, your study is based to a great degree upon your looking at the downed timber in an adjacent area and getting some ideas, and then going into the standing timber and using that information to determine what quality of logs and what kind of standing timber there was in the adjoining area; is that correct?

A. Not only that information, but the interpretation of the grading rules there. What I was searching for was a numerical expression, quantitative expression of the quality of the logs to be found in the forest.

Q. On how many occasions have you used these grading rules that you mentioned for a quality cruise of redwood timber?

A. This is the second time.

Mr. Phelps: Have you finished?

The Court: Well, maybe if this becomes an issue, why, you may have somebody yourself testify, and maybe after you have heard the testimony he might not make as good a guess as the next fellow. [386]

Mr. Rank: Well, I know the purpose of this testimony. The purpose of this testimony is to establish the quantity and then they will have some witness testify "Now with timber of that quality and that quantity, what is it worth?" So therefore I think they ought to have a proper foundation for that type of testimony.

(Testimony of Charles H. Bunting.)

The Court: Doesn't the objection go more to the weight than the admissibility?

Mr. Rank: He has to have more experience **than** he has had to even qualify as an expert.

The Court: You might not be satisfied with somebody who had done it five or six times or seven times because you had somebody who is **better** qualified to offer testimony. That is why we have been quarreling over experts in the courts.

Mr. Rank: You notice I am not objecting to his testifying as an expert on Douglas fir, because I recognize that. I probably shouldn't say so, but I know something about these things.

The Court: I understand your point. Are you taken by surprise or have you someone ready to testify? You must have someone ready to testify as to the amount of the timber——

Mr. Rank: I am not pressing the argument that I am taken by surprise. Whether I have anybody to testify or not has nothing to do with this objection, because I may not put anybody on on valuation whatever. [387]

The Court: Well, I think I can still decide, if it becomes a factual issue as between this testimony and some other testimony.

Mr. Rank: I appreciate it, but your Honor, it is the basis for their testimony as to value. That is what we are objecting to.

The Court: It is like the servant girl's situation with her illegitimate child, it was only a little one. You may have a little expert on the subject, but

(Testimony of Charles H. Bunting.)

where do you cut him off? One man is a little expert, the next man a medium expert and the next man is a big expert.

Mr. Rank: But this man is an expert 100 per cent or nothing.

The Court: I think I am safer and it is more just to let him testify, and if he isn't correct I am sure you are going to point it out. And if that happens, then all of the testimony becomes worthless.

Mr. Rank: Then may we mark these grading rules for identification? It is probably the wrong time to do it.

The Court: Those are his grading rules. Why don't you wait until the testimony is in.

Mr. Rank: Yes, I think it is premature.

The Court: I will allow the witness to answer. He may finish his testimony.

Mr. Phelps: I don't know whether the witness has in mind [388] the question. I will reframe it, state it over again.

Q. Mr. Bunting, based on your cruise of the 14 forties of Ward land on the virgin timber—based on your cruise, study and valuation, do you have an opinion and conclusion, and if you have, what is it?

Mr. Rank: That isn't the question you asked.

The Court: Oh, no, the question you were asking concerned the quantity and qualitative findings as to the redwood. That is what you were asking.

(Testimony of Charles H. Bunting.)

Mr. Phelps: I didn't say anything about valuation, did I? If I did, it was a slip of the tongue, because I didn't mean to. It was quantitative.

Mr. Rank: You did.

Mr. Phelps: I am sorry, your Honor. That was a slip of the tongue. No, quantities are the only things I am concerned with.

Q. Mr. Bunting, what is your opinion and conclusion based on your study, cruise, and examination of those 14 forties of Ward land of virgin timber as to the proportion of the timber and the classifications of grade logs 1, 2 and 3, of redwood as you have just defined them?

A. I found 46.4 per cent of the volume of the sample was in grade 1 logs; 31.8 per cent of the volume was in grade 2 logs; and 21.8 were in grade 3.

Q. Can you state—and don't answer this question because [389] I don't want to trespass on the Court's ruling until there has been a chance to rule—can you state in a general way as to redwood timber whether that would be considered a good stand of redwood timber or a medium stand or a poor stand of redwood timber by quality? Just a moment; don't answer it.

Mr. Rank: Yes. Well, I am just going to repeat the objection. With the experience he has had in redwood I don't think he is qualified to answer it.

Mr. Phelps: I submit it, your Honor.

The Court: I will let the witness answer.

(Testimony of Charles H. Bunting.)

A. I would say that was a good stand of redwood.

The Court: You mean qualitatively?

The Witness: Qualitatively, that is a high quality stand.

Mr. Phelps: Now the next matter I was about to get into reaches this problem, and I wanted this opportunity only: If I can place my hands on a case somewhere lurking in the back of my mind, I should like to consult that during the recess.

The Court: Ask whatever question you want.

Mr. Phelps: I was hoping perhaps I could find the case during the recess, I had in mind. I may not be able to come up with it, but if I can I would like to.

The Court: During the recess?

Mr. Phelps: Yes, that is what I had in mind.

The Court: We will take the recess now.

(Short recess.) [390]

Mr. Phelps: Your Honor, I see, has placed your hands on a case. I wasn't able to find the Del Monte Stands case that I had recalled, but over the recess I will endeavor to do so.

In the meantime, if your Honor has something which you feel was pertinent——

The Court: I merely suggest that you have got people involved in this case who are expert in the valuating of property. Your own client can probably testify as to values. Mr. Ward is possibly an expert on values. The gentleman who is here from

(Testimony of Charles H. Bunting.)

the other lumber company may have had experience in knowing the values of property. Those are the kind of people whose testimony would have more value.

Mr. Phelps: I understand that rule, your Honor, and you may recall that I asked Mr. Ward if he had an opinion on the value, and he said he had none. I asked him separately with respect to both——

The Court: He probably does, but he was modestly refraining from giving you any fodder for your defense.

Mr. Rank: Mr. Ward is very modest.

Mr. Phelps: I sized it up that way myself, your Honor.

All right, please bear with me, I will be quick, just to make a record on this one point, and in order to do so I am going to ask a question which involves these various elements, and then we can put it together in one package. [391]

Q. (By Mr. Phelps): First of all, will you state whether or not in your investigation and study of these 14 forties, whether you made an investigation to determine the cost of these items with respect to felling and bucking Douglas fir——

Mr. Rank: To which we will object——

Mr. Phelps: I was going to include them all, and then you can make your objection.

Mr. Rank: Don't give any costs or anything.

Mr. Phelps: Oh, no, I understand.

Q. (By Mr. Phelps): You were just asked

(Testimony of Charles H. Bunting.)

whether you made an investigation, and answer the question, please.

Well, I will go on. I think you understand it so far—whether you made an investigation to determine these items with respect to Douglas fir, felling and bucking charges, yarding and hauling charges, the cost of building roads, supervision charge, and the log haul charge. As to each one of those items, did you make an investigation as a result of which you have an opinion and conclusion as to the reasonable cost of those items in the Humboldt-Del Norte area, covered by these lands?

Mr. Rank: Just a minute; to which we will object as being incompetent, irrelevant and immaterial insofar as this particular witness as a valuation witness is concerned.

The Court: Now you are asking him something that he ascertained to be the cost—— [392]

Mr. Phelps: Yes, whether he made an investigation to determine these various items. My only purpose, your Honor, is to show the various elements that enter into the determining of the very formula that your Honor thinks is inadmissible. With deference, I am just trying to state the items which enter into it, because I think it has to be shown in that way.

Mr. Rank: But it isn't material, in our opinion.

Mr. Phelps: I am perfectly willing to submit it for the Court's ruling, but I am just trying to make a record.

The Court: I thought that you were just trying

(Testimony of Charles H. Bunting.)

to find out his opinion as to the quality and quantity of the lumber there.

Mr. Phelps: Yes, your Honor, and that I have established.

The Court: Then you were going to ask some other witness on that basis what the value of the land was?

Mr. Phelps: Your Honor may have misunderstood me or I may have misunderstood you.

The Court: The testimony would be hearsay as to the costs of doing those things.

Mr. Phelps: Well, query: Would it, where he is making an investigation to determine the reasonable costs of all these various items and knows them in that area, and then that goes to make up his valuation figure as he arrives at it? All I want to do is to ask him these various items. I [393] understand your Honor has ruled, and perhaps we could handle it very quickly this way: Suppose I made a very quick offer of proof, and then your Honor were to rule against me, then we would have it in the record.

The Court: If you want to do that, that is perfectly all right.

Mr. Phelps: I am just trying to expedite it.

The Court: I will call your attention to a case, both of you, if you wish to have it.

Mr. Phelps: Yes.

Mr. Rank: Yes.

The Court: Of course it is a Federal decision; I don't know whether they have any value.

(Testimony of Charles H. Bunting.)

Mr. Rank: We are in a Federal court, aren't we?

Mr. Phelps: This is controlled by California law.

The Court: United States versus 13.40 acres of land in Richmond, Contra Costa County, California. That was a United States Maritime Commission case involving shipyard property that was acquired by the Government over in Contra Costa County. It is in 56 Fed. Supp. 535, and you will find a pertinent discussion commencing at page 538 and following pages. And some other cases cited in there, too, that are to the same effect. It points out that the valuation of property with valuable minerals on it is to be determined on the basis of what the property with the minerals in the ground [394] is worth on the market and any testimony as to what it costs to dig it out and what it costs to haul it to the market and what the man would get out of it is purely speculative, because that enters into the realm of business, and what would be profitable for one man might become unprofitable to another man. A good operator might pay more for a piece of property than a poor operator. And if you rest judgment as to the value of property on factors of that kind, then you are resting judgment as to value on speculative and conjectural factors. That is pointed out here, and there are other cases along the same line.

Mr. Phelps: That is a condemnation case?

The Court: That is a condemnation case, but the

(Testimony of Charles H. Bunting.)

question discussed is the question of value—what is the test of value of property. And it is of course a competent case here because it is the same type of thing. There are some oil cases too that I just couldn't put my finger on quickly enough, but this case may have some significance.

Mr. Phelps: Yes.

The Court: That is why you put real estate men on the stand to testify as to real estate values. And the value of a piece of property where a shoe store is conducted, you don't put a shoe merchant on the stand to testify even though he knows all about whether or not a shoe business can be operated profitably there; you have to put a man on the witness [395] stand who is an expert in selling and dealing and who has knowledge of the value on the market of that piece of property as such when you are dealing with real estate. And that is the distinction in the authorities.

I am sorry we have taken up so much time on this. I am responsible for it. I thought I might as well advise you what I believe is the rule of law in that regard and why it is that this witness is not competent to testify as to values because he is a technician on that subject and is the kind of fellow who has been dealing in these properties and making use of his peculiar qualifications and aptitudes, but he is not an expert on value of this kind of property. [396]

Mr. Phelps: I do not want to trespass. I suppose in order to make a record, rather than ask a

(Testimony of Charles H. Bunting.)

series of questions, why can't I, by stipulation, simply make an offer of proof?

The Court: So that you may have your record, ask him what his opinion is as to the value of this property and then I will rule on the objection, and then you will have the record, and relate it to the discussion that we have already had, which will be an indication of the basis of the ruling.

Mr. Phelps: Certainly. May I ask him one preliminary question as to these various elements so that it may appear what he took into consideration, and then ask him the question. I think that will establish the record.

The Court: All right.

Q. (By Mr. Phelps): Mr. Bunting, in the course of your study, investigation and appraisal of the value of the 14 forties in the Ward lands, did you make an investigation, determine, and consider just these elements: first of all, with respect to the cost of logging, both of redwood and fir, the cost at that time in that area of the falling, bucking and peeling, the road construction, the yarding and loading, supervision boss, log haul to Arcata and the road construction and miscellaneous costs, and did you also make an investigation, study and determination of the market value in the Arcata market of the price, the reasonable market value of the price of each of the class of Douglas fir logs that you have [397] heretofore described and of the price, the reasonable market price, camp run price,

(Testimony of Charles H. Bunting.)

Humboldt Log Rule for redwood in that area? Did you make that? That is all I am asking.

Mr. Rank: We will submit our objection to that.

The Court: I will allow him to answer that question yes or no.

A. Yes, I did.

Q. (By Mr. Phelps): In arriving at your opinion and conclusion as to the value of the 14 forties virgin timber did you take into consideration each and all of those elements? A. Yes, I did.

Q. As a result of your investigation, study, cruise and evaluation did you arrive at a figure which in your opinion is the reasonable market value of the timber, both redwood and fir, upon the 14 forties that you studied?

Mr. Rank: To which we will submit the objection that we have previously stated.

The Court: For the reasons I have already stated I will sustain that objection.

Mr. Phelps: Thank you, your Honor, for your patience.

Cross-Examination

By Mr. Rank:

Q. Mr. Bunting, just a few questions on your quality cruise of redwood. What you did, as I gather, is determine the percentage of merchantable logs that had fallen [398] in each of the three grades you mentioned, 1, 2 and 3?

A. Yes. Your question was quality?

(Testimony of Charles H. Bunting.)

Q. Quality, yes. I am talking about nothing but quality now, Mr. Bunting.

A. Yes, I determined the percentage in each of the three grades of redwood.

Q. Did you determine the percentage of cull logs in the area that you covered?

A. I culled the logs by inspection if I felt they were cull logs.

Q. What I am getting at is this: You have given us the three percentages of grades 1, 2 and 3, the total of which is 100. There are other logs there that would be called cull logs, would they not?

A. Correct.

Q. Do you have any idea of the percentage of cull logs in the tract that you made the computation of?

A. I did not make a percentage of cull logs, but they do not enter into the percentages as computed here, because the percentage was the quantity of merchantable material that would go on the market. I recognized cull logs as I cruised and I threw them out. I have a record of them, but I have not computed the percentage.

Q. So that what you have done, for example, you would look at 100 trees and you determined there were so many feet of [399] merchantable logs there, and then determined the percentage of each grade of merchantable logs. I mean, just as an example.

A. There were some 250 of them, but I graded each log in the tree as I came to the tree.

(Testimony of Charles H. Bunting.)

Q. A cruise, as I understand, is an estimate by an expert of the quantity of lumber that can be produced out of the particular area?

A. Well, the term, "cruise" is pretty all-inclusive, but let us say it is a sampling process. You can sample the quality, you can sample the quantity.

Q. Insofar as the quantity is concerned, if you cruise an area that is, say, ten million feet, under ordinarily good logging practices, ten million feet of merchantable logs could be produced. I appreciate there is a percentage that is allowable.

A. There is an error. You cruise within a certain error.

Mr. Phelps: I object to that as beyond the scope of the direct examination, if your Honor please.

The Court: Overruled.

Q. (By Mr. Rank): The real proof of the accuracy of the cruise is really the actual production of an area, is it not?

A. Of a volume cruise?

Q. Yes.

A. Well, that is subject to certain qualifications.

Q. What are those qualifications? [400]

A. Well, how much care was exercised in felling the timber? How much care was exercised in logging? Any cruise can look foolish if the loggers go in and waste a substantial percentage of the timber.

Q. You are familiar with other cruises in the area, are you?

A. Yes.

(Testimony of Charles H. Bunting.)

Q. And you are familiar with cruises made by other cruisers? A. Yes.

Q. Are you familiar, for example, with the E. P. French cruises?

A. Yes, I have seen some of them.

Q. They are pretty reliable generally, aren't they?

A. I understand timber is regularly bought and sold on those cruises.

Q. So far as you know, probably more timber has been bought and sold on French cruises in that area than any other cruise, is it not?

A. I guess so. I can't say yes or no. I know it it used a lot.

Q. You have not given us any percentage of the total logs that could be produced that fall into the merchantable class, have you?

A. I do not quite follow your question. Percentage of total logs?

Q. Yes. [401]

A. What do you mean by that?

Q. That would be the cull and merchantable?

A. No, no, I have not expressed a ratio between cull and merchantable logs, no.

Q. Would your opinion or your statement be changed at all if you knew that an adjoining tract of like grade and quality as this that contained, according to a percentage of the French cruise, some 120 million feet of merchantable redwood, actually produced only some 43 million feet of merchantable redwood?

(Testimony of Charles H. Bunting.)

Mr. Phelps: I will object to that. It is beyond the scope of the direct examination, unless you want to be bound by it.

The Court: Overruled.

A. No, it would not change my opinion because my log grading percentages here are based upon my investigation. They do not have to stand or fall according to some cruise that somebody else made. There is a total distinction between a quantity cruise and a quality cruise.

Q. (By Mr. Rank): I see. You really did not make any quantity cruise at all?

A. I didn't make a quantity cruise, and I would be the last person to say that a 5 per cent cruise of that area could be used anyway as an expression of quantity upon which to buy and sell. You see, I am looking for a log sample in making a [402] quality cruise. There are approximately five times as many logs, or four and a half or something, as there are trees. So that I do not need to have as many individuals in the sample as is required in a volume cruise. This is a quality cruise.

Q. So what you did, Mr. Bunting, you went through this area and picked out the trees that would produce merchantable logs, computed the total merchantable logs in that particular area that you cruised, and then you graded those merchantable logs into percentages according to your rules, into grades 1, 2 and 3?

A. Well, I would object to your use of the phrase "picked out."

(Testimony of Charles H. Bunting.)

Q. I do not mean that——

A. Let me explain it.

Q. You explain it.

A. Trees either contain merchantable logs, all merchantable logs to a certain height, they may have a cull log or more cull logs in them, or an individual tree may have been a total cull. The tree first of all is judged on its merits, whether it was merchantable or not, and the logs themselves were judged exclusively on surface characteristics.

Mr. Rank: I have no further questions.

The Court: Any further questions?

Mr. Phelps: One further question. [403]

Redirect Examination

By Mr. Phelps:

Q. With respect to surface characteristics, from your experience, sir, is there any difference in determining the quality of a standing tree from its surface as between the two species, fir and redwood, or what is the situation there?

A. If the grading rules are determined, are based exclusively on the surface characteristics—and by that we mean knots—then in many ways your ability depends on the experience the person has had in grading logs in the standing tree, not necessarily what species he has graded. These rules do not stand or fall, they are not based on the production of a certain quantity of lumber within the log. They are based entirely on the amount of surface, clear surface that they have, either 90 per

(Testimony of Charles H. Bunting.)

cent—let us simplify it—they are either 100 per cent clear, 75 per cent clear, or they are 50 per cent clear. And you have to case the tree over both sides and be quite careful, but insofar as an interpretation of the rules is concerned, it is almost identical with grading pine logs. You have got to use common sense and reject culls, yes, cull logs and cull trees, and it is necessary to know the utilization standards of the timber. That is one reason I mentioned the fact that I visited an adjacent logging operation. I almost always do that, whether I am in the pine or the fir or the redwood. [404]

Mr. Phelps: Thank you. I have no other questions.

Mr. Rank: No other questions.

Mr. Phelps: May the witness be excused, your Honor?

Mr. Rank: Yes, so far as we are concerned.

(Witness excused.)

Mr. Phelps: If it please your Honor, my next witness is along the same line and it is almost four o'clock. My thought is this. I will look at those cases, go back to the office, as tired as I am now and just before Thanksgiving, and see if I can find anything that would help me determine to call him or not. I wonder if I might do that.

The Court: All right. I do not want to sidetrack you, as I said before, from your own procedures, but I have had considerable experience in this line of work.

Mr. Phelps: I can appreciate that.

The Court: The test you will find in all the cases in the Olsen case and the cases that the Supreme Court decided, if you want to establish the value of this property, it has to be done on the basis of what a willing buyer would now pay for that property—that property—as it now stands in its present condition. That is market value of that property now. You will find that referred to in a number of decisions in the United States Supreme Court. The only time there has been any departure from that is in cases that occurred since the original decisions of the United States Supreme [405] Court where, as in the General Motors case, where the Government took less than leasehold portions of leasehold interest, and where the rule was varied to allow for special damages arising by virtue—

Mr. Phelps: Severance.

The Court: Not severance damage but special damages arising by virtue of the Government taking less than a whole interest in the property. As for example where they took only a part of a leasehold interest, and, for example, a year-by-year term in a building that was occupied, say, by a firm that sold the appurtenances and heavy machinery. They were forced to move out their machinery and seek another location. [406] They were forced to move out their machinery and seek another location. They came to the concept of allowing in addition, or being considered as part of the concept of fair market value additional compensation for special damages. But aside from that type of case, there

never has been any departure, so far as I know, from the general rule that in determining value for damage purposes, that it is the concept of fair market value what a willing buyer would pay to a willing seller of the particular property as is. There are a number of cases along the same line as this so-called Easter Hill case that I decided. I think if it is run down in the digest you will find that there are a number of cases since. Of course, those are all Federal cases, but I do not think the rule is any different in California under the condemnation law, and it is in those cases that the standards of fair market value were laid down. I think that is the problem that you have here. I may suggest to you—and I do not mean to do anything more than that—that I should not think you would have any difficulty with the people that you have here, who are dealing in these large projects of timber. You do not have to go down the line to a cruiser or someone who cuts timber to find out what the market value is. You can find it out from people who make it their business.

Mr. Phelps: There is no problem of establishing value from the owners of lands, of course. It was just that I thought [407] that this man was well-qualified and I wanted his opinion independently, you see.

The Court: You look into it a little bit and I think you will find I have not steered you wrong.

Mr. Phelps: No, your Honor.

The Court: Then we can resume Friday morning. Do you think you can complete the testimony?

It does not look to me as though we can complete the testimony Friday.

Mr. Rank: No.

The Court: It will take Monday. I have a criminal jury case that I have to take on Tuesday.

Mr. Rank: You think you will take Friday, Mr. Phelps?

Mr. Phelps: I do not know now. I would expect to complete our case along about the middle of the afternoon or late afternoon.

Mr. Rank: On Friday?

Mr. Phelps: Yes.

Mr. Rank: Of course——

Mr. Phelps: Your Honor, you say, has a case on Tuesday?

The Court: There is a fellow in jail who had demanded a jury, and I am starting the Master Calendar in the latter part of the week. I told you that before. We will run a little longer Friday.

Mr. Rank: Yes. Before we close, there are quite a few documents that we have requested, your Honor. May I ask [408] Mr. Mills, do you have the allocation of Hull document here? That was promised at the pre-trial conference. We have been waiting and waiting for it.

Mr. Phelps: It will be here, and incidentally, of you will search the pre-trial order, you will find I have requested certain things, including the Ward files, if I may have them——

Mr. Rank: You have everything that you requested, with the exception of the Blue Creek—I asked you for everything——

Mr. Phelps: We won't take it up now in the presence of the Court.

The Court: Why don't you talk that over with each other and get the documents that you want.

Mr. Rank: Financial statements, the profit and loss statements, and income tax returns for Union Bond and Trust Company for 1951 to 1953.

Mr. Phelps: All those matters, if you will recall, that is, the financial statements, we said we would have them here to present when we reached the point. We have not reached the point.

The Court: Do you have them here?

Mr. Phelps: Not yet. I hope to. They should be here also. Those are the things I had reference to that should be here when we put Mr. Wilson on. That is why I said what I did earlier. [409]

Mr. Rank: I have the minute book. It is in my possession. I just failed to bring it over.

Mr. Phelps: I will talk to you about other things.

The Court: You gentlemen please restrain yourselves tomorrow so you will be able to be here Friday.

Mr. Rank: Happy Thanksgiving.

Mr. Phelps: That is our wish also.

(Whereupon an adjournment was taken in the above-entitled action until the hour of 10:00 o'clock a.m., on Friday, the 26th day of November, 1954.) [410]

November 26, 1954 at 10:00 A.M.

The Clerk: Union Bond & Trust Company vs. Blue Creek Redwood Company.

Mr. Phelps: Ready.

Mr. Rank: Ready.

Mr. Phelps: Mr. Owens, will you resume the stand?

Mr. Rank: Shall we continue with him?

The Court: Whatever you wish.

Mr. Phelps: Yes, he is on cross-examination.

Mr. Rank: You are not going to have any valuation witnesses this morning?

Mr. Phelps: No. As a matter of fact, I am going to try to adjust my plans to fit your Honor's views, and we will shorten something on that, too.

The Court: All right.

PAUL C. OWENS

called as a witness on behalf of the plaintiff herein, who having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Rank:

Q. Mr. Owens, I have been handed a book this morning by your counsel, which I understand you have brought in response to the subpoena and in response to the [412] understanding of last week or last Wednesday. A. That is right.

Mr. Phelps: Not in response to the subpoena.

The Witness: It is in response to this mutual agreement or whatever you want to call it.

(Testimony of Paul C. Owens.)

Mr. Rank: May I have the original file for just a moment?

Q. Does the book that you have brought into court contain a record of payments received for logs sold and a record of the amounts of money deposited in the bank account?

A. At Arcata only.

Q. Yes, that is the bank account in the Bank of America, Arcata Branch.

A. That is correct.

Q. And a record of disbursements therefrom?

A. Yes.

Q. Over a period June 1, 1953 to and including June 1, 1954?

A. I do not believe it is complete up through June 1st, 1954. I believe it is up through May, as far as I have gotten here.

Q. It starts in June 1953 or even prior to that date. It is the complete record of those matters for Union Bond & Trust Company from the time they commenced their logging operations, is that correct?

A. Insofar as Arcata is concerned.

Mr. Rank: I would like to have this book marked for identification, if the Court please. May we refer to this as [413] the cash book?

The Witness: That is a general book. There is a good deal more than cash. It is a general work book is what it amounts to. It is cash, check records, sales—it is just a general book.

(Testimony of Paul C. Owens.)

Mr. Rank: It is for our purposes here a cash book?

The Witness: I would call it a general book is what it amounts to.

(The book referred to was thereupon marked Defendant's Exhibit X for identification.)

Q. (By Mr. Rank): I note that this book has the same type of binding and cover as the previous book that you brought down, Mr. Owens. Calling your attention to what I have referred to as a stumpage book, and which I believe you called the footage book, which contains the originals of which the photostats contained in Defendant's T for identification are copies, is that stumpage book or footage book bound in the same form and with the same appearance as the book you just brought into court?

A. Yes, it is the same.

Q. I wonder if you, Mr. Owens, would go through the book and first give the total income of Union Bond & Trust for each of the months June through the remaining balance of the year, and the funds deposited in the bank account at Arcata?

A. You are speaking of income of the Union Bond, just as to [414] this book?

Q. Just what appears in that book.

A. You want it for the months of June to the end of the year?

Q. Yes.

(Testimony of Paul C. Owens.)

Mr. Phelps: I do not see any materiality and I will object on the ground it is incompetent, irrelevant and immaterial and has no bearing on any issue in this case.

The Court: Overruled.

Mr. Phelps: Are you asking for gross or net?

Mr. Rank: Just the amount deposited in the bank account.

The Witness: Well, Mr. Rank, do you want the amount deposited or the amount of income?

Q. (By Mr. Rank): Which does your book show? A. There might be some variation.

Q. Does your book show income or deposits?

A. The book would show both.

The Court: You mean there are some checks not deposited?

The Witness: I do not mean that. The income is in here. Insofar as this book is concerned, the way I keep it is on an accrual basis, and the money might not come in for that particular month.

Q. (By Mr. Rank): Give it to me on a deposit basis, the actual money deposited in the bank.

A. All right. June there would be \$17,353.45.
July, \$83,611.93. [415]

August, \$105,837.32.

September, \$98,163.78.

October, \$85,069.52.

November, \$118,117.96.

December, \$119,675.94.

Q. Do you have in that book the gross amount received from the sale of logs by Union Bond &

(Testimony of Paul C. Owens.)

Trust by month? A. Yes.

Q. Will you give us that, please?

A. Do you want the same months on that?

Q. The same months, please.

A. In June there would be \$34,809.12.

July, \$72,253.54.

August, \$56,202.99.

September, \$84,195.12.

October, \$101,811.14.

November, \$88,881.19.

December, \$128,684.28.

Q. Is my understanding correct that your principal source of income was the sale of the logs sold by Union Bond & Trust Company and removed either from the Ward lands or Section 16?

A. That is correct.

Q. What other sources of income did you have, principal sources?

Mr. Phelps: You are not trying to confine that just to [416] Ward land, are you?

The Witness: I am sorry. That would be the case, Mr. Rank.

Q. (By Mr. Rank): From June to October was Union Bond & Trust Company removing any logs from the Sage lands?

A. I couldn't answer that without checking through the records, which I am not sure. I do not remember very definitely on that.

Q. In any event, Mr. Owens, your principal source of income was from the sale of logs?

A. That is correct.

(Testimony of Paul C. Owens.)

Q. And another source of income was from the \$5 stumpage that Coast Redwood was paying for logs it removed from the Ward lands and Sage lands? A. From Coast Redwood?

Q. Yes. A. That is right.

Q. Is there any other source of income—principal. I do not mean a dollar here, a dollar there. I mean any other regular sources of income?

A. Well, the only other source of income—it would not be classified as income but it would be classified as cash money received—would be money that might possibly be sent in from other sources, wire transfers.

Q. Do you have any record of those? [417]

A. It would show in those figures I gave you as cash received, yes.

Q. From that account you disbursed and made certain payments and paid your log haulers; you paid some of your operating expenses there, and then you also, I note, wired money to Portland and to the Security First National Bank of Los Angeles, is that correct? A. That is correct.

Q. Under whose instructions was that money transferred?

A. Well, the money would be transferred primarily under Mr. Wilson's instructions, or I believe occasionally it would be through some other member at the lumber company in Los Angeles.

Q. You have a record showing the monthly transfers, have you not? A. Yes.

(Testimony of Paul C. Owens.)

Q. Will you give us the total amount for each month, the same month?

A. You mean by wire transfers?

Q. Yes, your transfers to Portland and to Los Angeles. In other words, transfers that were made and not included as your regular current payments for accounts payable.

A. June there was wired to Portland \$15,300.08. July, wired to Portland \$17,893.11.

The same month wired to Los Angeles \$32,100.

August wired to Portland, \$23,700; Los Angeles \$20,700. [418]

September, wired to Portland \$32,189.86; wired to Los Angeles \$1600.

October wires to Portland \$25,355.06; Los Angeles \$5,000.

November, wires to Portland \$1500; Los Angeles \$33,000.

December, wires to Portland \$1500; to Los Angeles \$24,000.

Q. Do you show transfers to the Mountain Station Uranium Corporation?

A. I believe there is, Mr. Rank. They are not in total—yes, they are in total for each month.

Q. Will you just give us those figures, please?

A. The first month there was in wires to Mountain Station Uranium Corporation—that would have been in November.

Q. What was the amount?

A. \$5,000, and December \$2,000.

Q. Am I correct that included in your deposits

(Testimony of Paul C. Owens.)

for each month, Mr. Owens, were the sums received from Coast Redwood for stumpage on the Ward lands and those amounts for each month from June to October—and in fact, the entire year—equal the amount and quantity of logs that Union Bond & Trust Company reported to Ward times \$5, is that correct?

A. The amount given to Union Bond by Coast and reported to Ward times \$5?

Q. Yes, each month.

A. Yes, that would be correct. [419]

Q. So that each month Union was receiving and depositing in its bank account \$5,000 for each thousand feet of logs removed by Coast from the Ward lands? A. That is correct.

Q. And as shown in Defendant's Exhibit J, pre-trial conference, which I now hand you?

A. Well, these are the regular monthly recaps as sent in by Coast, are they not?

Q. Yes, they are.

A. That would be correct. [420]

Q. Mr. Owens, during this period, do you know whether or not Union Bond and Trust had any employees on its actual payroll, directly on its payroll in this area? By this area, I mean the Eureka-Arcata Area?

A. Well, Mr. Rank, as far as I know, in the area Union Bond had no direct payroll.

Q. It had an arrangement with Coast Redwood whereby it would share some of the expenses of Coast's employees; is that correct?

(Testimony of Paul C. Owens.)

A. A few of them, yes.

Q. A few of them? A. Yes.

Q. Can you name the employees of Coast Redwood whose payroll expense was shared by Union?

Mr. Phelps: Is this material, your Honor?

The Court: Read the question.

(The Reporter read the question.)

The Court: What is the materiality?

Mr. Rank: I will withdraw it temporarily.

Q. (By Mr. Rank): There was an arrangement between Union and Coast Redwood whereby Union Bond shared some of the expenses of Coast employees, I understand; that is correct, isn't it?

A. That is correct.

Q. What was the basis for that allocation of expenses? [421]

Mr. Phelps: Same objection. I don't see the materiality of that; it is incompetent, irrelevant and immaterial, objected to on that ground.

The Court: You are seeking to show how the proceeds of Union Bond were disbursed?

Mr. Rank: Yes, I have something in mind. You see, if the Court please, the way this case is going to get here, we have to anticipate some things, and I just have something in mind. I just wanted to get this arrangement cleared up.

The Court: What do you mean by basis—percentage-wise?

Mr. Rank: Yes.

The Court: All right; let him answer.

(Testimony of Paul C. Owens.)

Mr. Rank: Just what was the general arrangement.

The Witness: Well, there was a general arrangement—there were a few employees—I don't offhand know just all of them, although there were only very few. The logging superintendent, for instance, his expenses were shared by the Coast Redwood, inasmuch as he was working for Union Bond part of the time and for Coast Redwood part of the time. And I believe the scaler in the woods, his expenses were shared also, inasmuch as he was scaling logs both for Coast Redwood Company and for Union Bond and Trust Company. As far as sharing expenses, I believe the only other man would have been the assistant logging superintendent, that I recall. [422]

Q. What was his name? A. E. L. Tyler.

Q. So, if I understand you correctly—the Superintendent's name was Doxie?

A. No, the Superintendent at that time, Mr. Rank, was Mr. J. J. Adkins.

Q. J. J. Adkins?

A. Are you speaking of '53?

Q. Yes. Well, I am speaking of '53—let us find out first about '53. J. J. Adkins?

A. That's right.

Q. Scaler Nelson?

A. No, the scaler at that time—it would be two scalers; actually then it would be Mr. James K. Elliott and Henry Nelson.

(Testimony of Paul C. Owens.)

Q. And Tyler while Tyler was there?

A. That's right.

Q. Now in 1954, what employees had their expenses shared with Coast?

Mr. Phelps: I can't see the materiality of this.

Mr. Rank: It is going to be very material; this is going to take but a short time to tie this in.

The Court: All right. Overruled.

The Witness: In 1954?

Q. (By Mr. Rank): Yes. [423]

A. Subsequent to Mr. Adams leaving, it would have been Mr. Robert Doxie and the same scalers.

Q. Doxie, Elliott and Nelson?

A. That is correct.

Q. And that is it, that is all?

A. That is all to the best of my knowledge, Mr. Rank.

Q. Whatever records of the payment of their share of expenses—I mean of that share—does that appear in those books?

A. Not just those particular ones that you are speaking of, because any billings of Coast Redwood to Union would have included numerous items so that you wouldn't be able to break it down just from the book.

Q. Did Union show the expenses of the employees of any other of the Wilson companies as far as the Eureka-Arcata Area was concerned, in 1954?

A. So far as I know, no.

Q. You handled the books; you would know, would you not?

(Testimony of Paul C. Owens.)

A. From there, yes, from that area.

Q. As I recall from your testimony yesterday, you were in charge of the Coast Redwood funds which were now creditors' committee funds, were they not, referring to 1953 following April?

A. Well, I was in charge of them generally with that committee, Mr. Rank. [424]

Q. And that arrangement was, as you have stated, under an order of court in Los Angeles?

A. That is correct.

Q. Judge Brink, Referee in Bankruptcy, made the order; is that correct?

A. That is correct.

Q. You don't have a copy of that order with you, do you, Mr. Owens?

A. No, I do not, Mr. Rank.

Q. I show you a photostatic copy of certified check of Coast Redwood Company, dated July 2, 1953, payable to the Auditor, Humboldt County, in the sum of \$4,331.69, and ask you if that is your signature and if you drew that check?

A. Well, the figures are a little dim, but it does look like it, yes, I would say.

Q. Do you recall sending that check to Mr. Fletcher?

Mr. Phelps: I will object to that, if your Honor please, as incompetent, irrelevant and immaterial. I don't see what possible relation a check for taxes in 1953 would have to do with this matter.

Mr. Rank: If the Court please, I am endeavor-

(Testimony of Paul C. Owens.)

ing to eliminate the necessity of recalling Mr. Owens following the plaintiff's case. It is perfectly satisfactory with me.

Mr. Phelps: I will assist in that endeavor if you will just indicate to me that it has some materiality, it is all [425] right, but I don't see it, Mr. Rank.

Mr. Rank: This check was deposited with Mr. Fletcher by Union Bond and Trust Company as a deposit for taxes in 1953. Those circumstances are going to be brought out in detail later on. I wanted to identify that check at the present time as coming from Owens and ask some questions about it.

The Court: All right.

The Witness: Mr. Rank, that check was drawn by Coast Redwood. As to the fact that it was sent to Mr. Fletcher, I don't know for sure at the time, but I know the check was drawn.

Q. And under whose instructions?

A. I believe the check was drawn by instructions of Mr. Wilson.

Mr. Rank: I would ask that that be marked for identification as Defendant's next in order.

The Clerk: Defendant's Exhibit Y marked for Identification.

(Whereupon check heretofore referred to and identified was marked Defendant's Exhibit Y for Identification only.)

Mr. Rank: Do you know whether you had an order of court approving the drawing of that check

(Testimony of Paul C. Owens.)

prior to it being drawn and delivered to Mr. Wilson?

Mr. Phelps: I will object to that as [426] incompetent, irrelevant and immaterial.

Mr. Rank: I submit, if the Court please, that the answer to that may be very material.

The Court: Well, it is just a matter of order of proof. If it isn't material, the Court won't consider it.

Mr. Phelps: Certainly, your Honor.

Mr. Rank: All right.

The Witness: I don't believe that there was a written order to that effect, Mr. Rank. As I recall, the Trustee for the Court authorized the payment of it.

Q. Prior to the issuance of the check?

A. Well, I don't know for sure about that. That I couldn't answer, Mr. Rank, that far back.

Q. You are referring to Mr. Paul Sampsell, are you not? A. That is correct.

Q. As far as you know, did Mr. Sampsell even know about that check prior to its issuance?

A. Well, that I couldn't answer either, Mr. Rank.

Q. Do you recall, Mr. Owens, on or about the 30th day of December, 1953, Coast Redwood issuing its check to the Treasurer of Humboldt County in the sum of \$13,282.55 in payment of taxes on the Ward properties? Do you recall that, Mr. Owens, and I show you a receipt from the Auditor which bears out that statement?

(Testimony of Paul C. Owens.)

A. I am not sure whether this was paid by Coast Redwood or [427] not, Mr. Rank. I recall the tax figure of \$13,000.

Q. I would like to call your attention to the statement at the top:

“Received of Coast Redwood.”

A. Oh, I didn't see that. Well, actually whether Coast paid that or not, although I assume that they did—I wouldn't know.

Q. Do you recall drawing the check?

A. No, I don't, Mr. Rank. The only one I recall actually drawing is that one for some four thousand.

Q. Would a check drawn on the 29th or 30th of December appear in the book that you have just brought down this morning?

A. You mean Union?

Q. Yes. No, that is correct; that is a Union check, isn't it; that would be the Union book.

A. That isn't the Coast Redwood book there.

Q. Do you have any recollection at all on that matter as far as that check and that payment is concerned?

A. Not to say definitely, Mr. Rank, not definitely. I do recall, and I believe it was paid, but actually when the check was drawn or how it was drawn or paid, I am not sure, no.

Q. Do you know whether or not at the time that the check was drawn that you had any prior authorization of the Court to draw the check? [428]

(Testimony of Paul C. Owens.)

A. If the check was drawn, Mr. Rank, the check would not have been drawn without authority, I can assure you that, because Mr.—I believe at that time Mr. Victory, Mr. McManus and myself would not sign such a check unless we did have authority.

Q. Do you recall under whose instructions you drew the check?

A. I am not sure that I drew that check.

Mr. Rank: I ask that that be marked for Identification.

The Clerk: The Defendant's Exhibit Z marked for Identification.

(Whereupon check heretofore referred to and identified was marked Defendant's Exhibit Z for Identification Only.)

Mr. Rank: Returning to your cash book or general record that you brought down, would you check and see whether or not there was a check drawn in December from the Union Bond and Trust Funds for the tax item we are just referring to?

A. In December?

Q. Yes, it would have been drawn December 28th or 29th, Mr. Owens. This is the amount. For that amount, for that amount.

A. Well, there is no check for that amount drawn, Mr. Rank, in the month of [429] December.

Q. Do you have any record in there showing the repayment of this amount to Coast Redwood,

(Testimony of Paul C. Owens.)

Q. Yes. A. In that month?

Q. Or January or February?

A. Well, it would show if it is in here.

Q. That is what I mean.

A. There is no figure like that in January or February.

Q. Or March?

A. I am in March now. No, nor March.

Q. Go on through the book further, Mr. Owens. I would like to see if there is any such entries.

Mr. Phelps: Well, I don't see the materiality, if your Honor please, at least in this piece of litigation, I can't see any materiality and I am going to object to it. It could have been by credit of stumpage; and if even it wasn't, what difference does it make in this lawsuit? I don't see it.

The Court: I can't tell yet either.

Mr. Phelps: All right.

The Court: So you might as well answer the question. He asked several questions along the same lines.

The Witness: That is as far as the book goes, through May, and I don't see no record.

Q. (By Mr. Rank): Now, Mr. Owens, just to clear up a few [430] things in your previous testimony. If you will recall—I am referring now to the information contained in the February 16th letter. Do you recall that letter? That is the letter that for the first time you sent any information to Ward concerning the logs removed from Ward property by Union Bond and Trust. Do you recall

(Testimony of Paul C. Owens.)

that letter? A. Yes.

Q. You have previously testified that you got the information to formulate the total from the pink slips. Now as a matter of fact, you got it off the stumpage book, did you not—that is the information contained in the original of Defendant's Exhibit T?

A. No, I believe at that time, Mr. Rank—I am not definitely sure that in February that my book was complete to that point; in fact, I am pretty sure it wasn't, and I used the basis of the pink slips. Now that would have to be checked, but I am reasonably certain that the book wasn't completed to that point at that date. That I am not definitely sure of, but I believe it was the pink slips.

Q. You were instructed by Mr. Wilson to send that information sometime after you received the phone call from Mr. Fletcher, which was February 11th, and you sent the information off on February 16th. Now is it your testimony that in that two or three or four day period, whatever it might have been, that you went to the vault of Coast Redwood and got out the pink slips [431] for November and December and took the information from those?

A. Well, all I did, Mr. Rank, at that particular time—it was just a simple matter to run an adding machine tape up on it.

Q. From where?

A. Right from the pink slips which could be done very easily.

(Testimony of Paul C. Owens.)

Q. Do you have any recollection of that?

A. I am not definitely sure, but had I done it that way—I am not definitely sure, but if I would have, that would have been the method I used.

Q. Do you recall getting those pink slips out of the vault in February?

A. As I recall, I did, yes.

Q. Now when Mr. Wilson told you to send that information, did you tell him where you would have to get it?

A. No, I am not definitely sure of that. I know I was instructed to send the pink slips on in the event I had them, which I did. [432]

Q. You were also instructed to send the letter, as you testified?

A. Yes, I was asked to send a letter of transmittal.

Q. Would you call that a letter of transmittal or a letter reporting a quantity of logs?

A. Both, I believe, Mr. Rank.

Q. Would you please read the letter and see if there is any reference in there to transmitting the pink slips, from which that could be called a letter of transmittal?

A. Well, the letter of transmittal that I have reference to, Mr. Rank, would be the notice of the fact that we were sending the tickets, and that this letter was merely showing the footage for which those tickets represent.

Q. And advising that you were going to send the tickets?

A. Yes, that is right.

(Testimony of Paul C. Owens.)

Q. But you did not send this as a letter of transmittal of the tickets?

A. No, that is correct.

Q. When you discussed with Mr. Wilson the sending of this information as to the quantity of logs, what was the discussion as to where you would get that information, if there was such a discussion?

A. Well, I don't believe there was such a discussion, Mr. Rank. As to where I got the information as to the stumpage, Mr. Wilson never did ask. He asked that I send information [433] to them and send the pink slips, and I believe that was more or less the extent of that.

Q. Is it fair to assume from the conversation he gathered you had the information, could get it together, and could send it?

A. I don't recall that. I believe he asked me if I could get it, and that is the reason I made reference to these pink tickets the other day, due to the fact that I knew I had them and I could easily give the information off of them.

Q. Under your direct examination—by that, I mean your examination by Mr. Phelps, Mr. Owens—or I believe it was in my early cross-examination before the fact of these photostats came out, starting at the bottom of page 259, I asked you the following questions:

“Question: Did you have any conversation with Mr. Wilson concerning this matter from the summer of 1953 until May 12th, other than you have

(Testimony of Paul C. Owens.)

testified to here? By 'this matter,' I mean a possible failure of reporting Union Bond & Trust Company logs?

"Answer: Well, we had a conversation. The exact time, I don't know when it was. It has been some time ago when we had a conversation. Probably after you people notified him or somebody notified him of it. Then he wanted to know why I had not done it. [434]

"Question: He wanted to know why you had not done it?

"Answer: Why I had not sent Union Bond out, why I had not made stumpage reports, and so forth.

"Question: What did you reply?

"Answer: My explanation was the same explanation given to this Court."

Is that your explanation now or would you please relate the conversation as you recall it, Mr. Owens?

A. Well, I mean as far as an explanation, Mr. Rank, it all goes back to the reason I had not done it prior to—had not sent any tickets prior to this first time, as I believe you said, in February here, so far as I knew—I mean I had no knowledge of just what the circumstances or the deal was between Union Bond and the Ward people. I had no knowledge of it, and that was the only reason I had not sent them out.

Q. Up to this time in your testimony, may I call your attention, Mr. Owens, you had not testified about this February conversation.

(Testimony of Paul C. Owens.)

Mr. Phelps: I do not think the record will bear you out. You look at page 256.

The Court: We are getting argumentative on both sides. Ask another question. Don't ask argumentative questions.

Q. (By Mr. Rank): If that conversation occurred, Mr. Owens, this last conversation, you did know and had in mind the fact [435] that you had the November-December slips and Mr. Wilson knew about it, didn't you?

A. I don't quite get just what you are getting at.

Q. When Mr. Wilson spoke to you after the notice of the termination and wanted to know why you had not sent out the slips, did you have in mind the conversation you had had with him in February wherein he instructed you to send the November-December slips?

A. Well, definitely I wouldn't say that, Mr. Rank. I don't know. I am not quite sure.

Q. Isn't it a fact, Mr. Owens, that this conversation you have just testified to as having happened after the notice of termination did not in fact take place?

A. Well, now, what conversation do you have in mind?

Q. Some conversation that you testified to that took place after the notice of termination in which Mr. Wilson was supposed to have asked you why you had not sent the pink slips?

A. I am not definitely sure, Mr. Rank, whether it was after the termination or prior to the notice,

(Testimony of Paul C. Owens.)

because as I believe I did testify, I had no knowledge as to just when that notice was given until this court session. The fact that it was given on May 12th was news to me when I got here. So the actual conversation I am not definitely sure whether it was after this or prior to this date.

Q. You know, do you not, Mr. Owens, that at no time after [436] the giving of notice of cancellation did you have a conversation with Mr. Wilson wherein he asked you why you had not sent the pink slips from June to October?

A. Well, I don't know that it was after that. You are getting back to the same thing, Mr. Rank. I wouldn't say it was after that, whether it was or was not, because that far back I don't remember—as to whether it was prior or afterwards.

Q. Let us clear up another matter, Mr. Owens. In your first testimony, and calling your attention to our first conversation up there, March 24th, you left the inference, I believe, that you would not want to be held to much in that conversation, not when you had been drinking? A. That is correct.

Q. That is not correct so far as that conversation is concerned, is it?

A. Yes, Mr. Rank, a good deal of it. I would say most of it. This bar afterwards, and bearing in mind the numerous amount of activity that has happened subsequent to that date, for me—well, I wouldn't say, actually I wouldn't know all of it. If something was brought to my mind it might bear out something.

(Testimony of Paul C. Owens.)

Q. It was not because you had been drinking, was it?

A. Well, I believe it was, actually, Mr. Rank.

Q. Do you recall, Mr. Owens, that night you came to my hotel and had a couple of highballs, we went to Lenzi's for [437] dinner, left there about 10 o'clock, and you went back to work in your office?

A. The fact that I went back to work I am not sure of. That is probably what I had intended to do, but I don't believe I did. In fact, I am sure I did not.

Q. Do you recall telling me the next day you went back to work and worked until 1:30 or 2:00?

A. Maybe I did; I might have said that, Mr. Rank. I am not definitely sure of that.

Q. Calling your attention again to the book that you brought down this morning, Defendant's Exhibit X, you now recall opening that book and showing it to me in your office the day following this last conversation?

A. It was not this particular one. It might have been a similar one, Mr. Rank, although the book—the method I have is that I use work sheets such as these sheets are for awhile. It is possible that it might have been this book. I am not definitely sure of that, Mr. Rank, or it might have been my cash sheets, which we make up during the month, and then we throw away part of them. Which of the two, Mr. Rank, I wouldn't say.

Q. Would your cash sheets that you are talking about now have information as early as June and as late as December?

A. You mean——

(Testimony of Paul C. Owens.)

Q. These sheets you are referring to now. [438]

A. They are current each month. First of all, the cash sheet is made up daily.

Q. Would you keep these cash sheets for the whole year?

A. That I wouldn't say definitely. I don't know. There are times when work sheets are kept for a longer period of time. Normally they are only for a month.

Q. Mr. Owens, don't you recall opening this book and reading off to me——

A. Well, now——

Q. Just a moment, Mr. Owens—and reading off to me the figures that I read in court the other day as to cash and as to sales, and don't you also recall reading off to me the fact of the payment to Mountain Station Uranium Corporation?

A. Those payments were made. I would say it is not definitely this book, Mr. Rank; it could be, but there are numerous other books kept. I don't want to say it is this book.

Q. What other books would have reference to the Mountain Station Uranium Corporation?

A. There are two books kept on this, Mr. Rank. One is kept during each month, and at the end of the month, and then after several months have accumulated, then it is put in this book, but it would be the same information, yes.

Q. You testified in answer to the question, "Do you remember at that time opening your cash book and showing me the figures of the dollar value of the

(Testimony of Paul C. Owens.)

sales of Union Bond & Trust month [439] by month?" "Not month by month," your answer. Is that your answer now?

A. Mr. Rank, I don't remember the whole entire thing. It could have been this book.

Q. Also I asked you when Mr. Wilson instructed you to send the February 16th letter, if he instructed you to send it on Coast Redwood stationery. Do you recall that instruction?

A. That instruction, as I testified, I wouldn't say definitely, Mr. Rank, no.

Q. You wouldn't say whether he did or he did not?

A. No, I would not.

Q. Would your memory have been better on that on March 24th and 25th than it would be now?

A. I imagine it would be, Mr. Rank. Undoubtedly it would have been.

Q. So if you told me that on that occasion, you probably remembered the incident better than you do now, is that it?

Mr. Phelps: That is argumentative.

The Court: Sustained.

Mr. Rank: He has answered it.

Q. In that first conversation with Mr. Wilson, this February conversation, did he tell you anything about auditing your stumpage records?

A. On the first conversation?

Q. Yes. [440]

A. No, I don't believe there was anything—I do not believe there was, Mr. Rank. I don't know for sure.

(Testimony of Paul C. Owens.)

Q. There was no need for auditing stumpage records, was there, when you have information such as contained in Defendant's T for identification? It is laid out right there, isn't it?

Mr. Phelps: That is objected to as argumentative, if Your Honor please.

Mr. Rank: Was there an answer to the question or was the objection sustained?

The Court: I think it is argumentative.

Mr. Rank: All right.

The Court: You can always leave something for the Court to form an opinion about.

Mr. Rank: I appreciate that.

Q. When you were sending the reports, the month reports to Wards in the regular course of business at Coast Redwood, and prior to the arrangement, were you sending them directly to Ward or were you sending them to Portland first? Will you relate how that was handled?

A. Well, I believe, Mr. Rank, that we have always sent them to Orchard Lake, Michigan. I mean to the best of my knowledge, the pink tickets and our recapitulations each month.

Q. In other words, you were sending them directly from the Coast Redwood office? [441]

A. Yes.

Q. What instructions did you have, if any, from Mr. Wilson as to when those should be sent?

A. Well, as I understand, I believe it was supposed to be sent in as soon as possible or by the 20th

(Testimony of Paul C. Owens.)

of the following month after the logs had been delivered or as near as possible to that date.

Q. Did Mr. Wilson give you any specific instruction at any time to wait and send them when the check was sent?

A. No, Mr. Rank, because we never had—we did not send the checks, no. That is not true, no.

Mr. Rank: I think, if the Court please, that is about as far as I can go with this witness. I really wanted to try to clear up with him today, but I am afraid I am going to have to ask him to be available to return if we want him after the plaintiff's case is in. You see, he was under subpoena by our side.

Mr. Phelps: Can't you finish with him now?

Mr. Rank: I am afraid I can't, Mr. Phelps. I had hoped to but I am afraid I can't.

Mr. Phelps: Is there any possible reason why you can't?

Mr. Rank: Yes, there is.

Mr. Phelps: Then I could finish with him also.

Mr. Rank: I am through so far as the cross-examination is concerned. If I call him back, I will call him back under [442] subpoena as my witness—not as my witness but back under subpoena. There are matters that I know which, if the testimony brought out is anything as it was in the depositions, I will probably want Mr. Owens back, because it is obvious even some of the things I asked today—

Mr. Phelps: Whatever Your Honor says.

The Court: What were you going to say?

Mr. Rank: It is obvious that even as to some of

(Testimony of Paul C. Owens.)

the questions I asked today the materiality was very much in doubt, and as I say, I was anticipating because I have taken some depositions and was anticipating what some of the testimony would be. Of course, I have him now under cross-examination as their witness. I have had him under cross-examination. I may want to call him as my witness.

Mr. Phelps: I just have in mind that it is usual to dispose of a witness.

Mr. Rank: I appreciate that. We would like to accommodate Mr. Owens but, after all, we have a case to try.

The Court: There is nothing I can do about it. We have not yet finished the plaintiff's case. The witness will have to remain.

Mr. Rank: Or he can come back. I am perfectly willing to do this. I know Mr. Owens is under subpoena and I know that if we try to accommodate him by letting him go back to Arcata, on a phone call or a wire he will come back, is that [443] right, Mr. Owens?

The Witness: Yes. I would rather do that, because my business is not doing any good sitting here.

The Court: You may do that.

Mr. Rank: Mr. Owens, if I feel it is necessary for you to come back, upon receiving a wire or phone call from me you will return?

The Witness: Yes, that would be satisfactory with me, rather than having to stay here.

Mr. Phelps: I will have some redirect at this time, if I may. Does Your Honor have in mind a

(Testimony of Paul C. Owens.)

recess this morning, because it would be an appropriate time and I won't have to break up the redirect.

The Court: All right, we will take a recess.

(Short recess.) [444]

Redirect Examination

By Mr. Phelps:

Q. Mr. Owens, in your testimony you have referred to books of the Union Bond and Trust Company, permanent books of the Union Bond and Trust Company on the one hand, and then you have referred to, I believe it is called work records or such as the book you have produced, and the stumpage book. Will you explain to the Court the difference and what those are, please, sir?

Mr. Rank: To which we will object. The books are before the Court. They all appear exactly the same, and I think they are self-explanatory. The witness has already testified to that.

Mr. Phelps: This is the only man who can tell how the different books were kept and for what purpose.

The Court: He has already covered it.

Mr. Phelps: I can reframe my question.

The Court: Hasn't it already been covered?

Mr. Phelps: I don't think fully.

The Court: You gentlemen do not have a monopoly on the Court's time. I have had reasonable experience in these matters. The witness has ex-

(Testimony of Paul C. Owens.)

plained how he kept these books. These books do not pretend to be the books of the Union Bond and Trust Company, but they are the books he kept of the transactions he made up there in Eureka.

Mr. Phelps: All right. [446]

The Court: What is the good of enlarging on that?

Mr. Phelps: May I be permitted this question? I hope I am not trespassing.

Q. So far as you were concerned, sir, did you consider these books—the books that you brought in today and the stumpage books—books called for, as you understood the subpoena?

Mr. Rank: To which we will object as being incompetent.

Mr. Phelps: That I think is proper.

The Court: I am not paying much attention to subpoenas or anything else, only the evidence in the case.

Mr. Phelps: All right.

Q. (By Mr. Phelps): May I ask this. Did you at any time, Mr. Owens, advise me prior to testifying the first day, did you advise me that there were any other books or record books other than the three you produced under subpoena?

Mr. Rank: To which we will object as being immaterial.

The Court: You don't have to try yourself in this case.

Mr. Phelps: I was going to ask the question so it is clear about that, and about Mr. Wilson as well.

(Testimony of Paul C. Owens.)

I will go on, if Your Honor please, if Your Honor sustains the objection.

Q. (By Mr. Phelps): In this book that you listed the various income from various months or cash receipts, would you likewise for the same months, please read off the total disbursements or expenses for those same months? And those months were May—June; pardon me; June '53 through December '53. [447]

A. Would you clarify that, Mr. Phelps, when you say "expenses or disbursements." You want the cash expenditures?

Q. No, I want the total expenses for each of those months.

Mr. Rank: To which we will object as being immaterial. And I have this in mind: I examined him on the cash disbursed. Now he testified it was on an accrual basis, and I think the only material part insofar as the redirect is concerned, if it is material, is the cash disbursed for their accounts payable.

Mr. Phelps: I didn't see the materiality of the other, but I just want the full picture; I want the expenses for each month, if I may.

The Court: Well, all right.

Q. (By Mr. Phelps): Do I understand these are not the amounts paid out in cash for expenses? Well, let's have both. That's easy.

A. That is from June through the end of the year?

Q. Yes, sir.

A. All right, the month of June, \$13,840.78.

(Testimony of Paul C. Owens.)

The Court: What is that?

The Witness: These are expenses as they are accrued each month, such as income might be accrued.

The Court: How much did you pay in expenses that month?

The Witness: As far as paid-outs, Your Honor, that would include such things as wire transfers or anything else; you [448] would have to break it down, Your Honor. There is a good number of things in here and this book is not complete to that extent of what was paid in cash except the total for the month, which includes a lot of items.

Q. Well, did your expenses accrued plus the money that you sent on to Portland and Los Angeles, exceed the amount of your receipts?

A. No, no, it wouldn't be that. Well, there would be—there would be one month. I can read from purchases, this accrual of expenses, and then you could read as to—

The Court: This is just meaningless to me unless you tell me what you are getting at. Reading out a lot of figures of expenses doesn't mean anything. What point are you trying to bring out? Tell me what it is, then we will ask one question that will cover it. What point do you wish to bring out?

Mr. Phelps: The point I wish to bring out, if Your Honor please—they have brought out various receipts and income from various sources. I want to show that that was not all profit and that there were expenses incurred in reference to it, so that the

(Testimony of Paul C. Owens.)

whole picture is there. I don't know what use they intend to make of it.

The Court: Each month what did you do with the balance of the money that you had received after you deduct the amounts that were remitted to Los Angeles and Portland offices? [449] What did you do with the rest of the money?

The Witness: The money just stayed in that account, Your Honor, just from day to day; I mean there wasn't any particular——

The Court: No, what general disposition? Did you pay it out for some other purposes?

The Witness: Oh, yes, Your Honor, for bills, invoices from companies, rental expense and various other items—a good many items.

The Court: Did you take a trial balance at the end of each month?

The Witness: No, sir.

The Court: Or at the end of December?

The Witness: No, sir, that would have to be done in Portland, which I assumed that Portland was doing, Your Honor.

The Court: You made no trial balance then yourself as to the receipts and the disbursements which you handled?

The Witness: The only thing I would have done as far as a trial balance——

The Court: Did you or didn't you? Did you take a trial balance? That is all I wanted to know.

The Witness: No, I didn't perform a trial balance, no.

(Testimony of Paul C. Owens.)

The Court: You always had money in the bank at all times during this period of time then?

The Witness: Well, yes, Your Honor, there was money in [450] the bank available for payments.

Mr. Phelps: All I want to show is what those expenses were month by month during this period of time. Maybe the easier way to do is to let the book go in evidence and we can use whatever figures are there for whatever purpose appears in the future.

Mr. Rank: Mr. Phelps, isn't there a summary at the end of each month showing the amounts paid on the various accounts to log haulers and so forth, that gives that in detail?

Mr. Phelps: If there is——

The Witness: Yes, there is a summary.

The Court: Take the summary for one month, June. What does the summary show?

A. The first month, June, the money is paid out as far as our cash was, there was paid out by wire transfer to Portland, \$15,300.08, and accounts totaling \$2,289.34; bank charges \$6.65.

The Court: Give us the same information for the next month. Is that what you want?

Mr. Phelps: Yes.

The Witness: This gets rather involved for this month, your Honor. There is a great amount of items. That particular month there was very little activity.

Mr. Rank: We are going to keep this book here anyway.

Mr. Phelps: That is what I was thinking. [451]

(Testimony of Paul C. Owens.)

Mr. Phelps: Why don't we have a stipulation that if any figures from that book are deemed material at any point in the case by either side, they can be referred to and introduced?

Mr. Rank: That is satisfactory.

The Court: All right.

Mr. Phelps: I have no other questions then, Your Honor.

Mr. Rank: No questions.

The Court: All right; you may go back to Arcata or Eureka, wherever it is.

The Witness: I will be glad to.

Mr. Phelps: Call Mr. A. K. Wilson, please.

A. K. WILSON

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court, sir?

The Witness: A. K. Wilson.

Direct Examination

By Mr. Phelps:

Q. Mr. Wilson, your address, sir? You live in Reno, Nevada? A. Yes, sir.

Q. And you are the President of Union Bond and Trust Company? [452]

A. Yes, sir.

Q. And were such in 1946? A. Yes, sir.

Q. And up through and including the present time? A. That's right.

(Testimony of A. K. Wilson.)

Q. And as President of Union Bond and Trust Company, will you state whether you were the person in active charge of its land acquisitions in Humboldt and Del Norte Counties in the years of '45 and '46? A. I was.

Q. And as such, did you study and become familiar with the timberlands in the Del Norte and Humboldt area? A. Yes, sir.

Q. And just as a general proposition, Mr. Wilson, not in detail, as a general proposition, what was the situation generally in 1946 with reference to redwood timber stumpage in that area?

A. Well, stumpage was very cheap when I first went down there in 1944, with the idea of acquiring a large tract of timber and conducting a large redwood operation. The timber could in many cases be bought for pretty near your own price, in fact; there was a great deal of tax timber, and we bought some of it. In fact, this particular timber was up for sale for taxes or ready to go up for sale for taxes.

Q. Is that the Ward timber? [453]

A. Yes.

Q. That is involved in this contract?

A. Yes.

Q. For how long a period of time had the Blue Creek Redwood Company to your knowledge failed to pay taxes on it?

Mr. Rank: We will object to that as being immaterial. The record speaks for itself.

The Court: Is there a record on that that can be produced?

(Testimony of A. K. Wilson.)

Mr. Phelps: I don't know. I don't have any record on that.

Mr. Rank: We don't have any record on that.

The Court: How would this witness know? Did he go in and examine the records?

Mr. Phelps: I don't know.

The Court: Or from general word of mouth basis, round about way?

Mr. Phelps: I think this particular property——

The Court: If it is important to be established, then there has to be some fact established.

Mr. Phelps: I won't press it.

Q. (By Mr. Phelps): But will you state whether or not, to your knowledge, this property was up for tax sale and it was necessary to bring an injunction to restrain the estate from [454] selling it?

Mr. Rank: To which we will object as being immaterial and incompetent and as far as this witness is concerned, purely hearsay.

Mr. Phelps: Well, it is the fact, and Mr. Fletcher represented it——

Mr. Rank: Let the witness testify, Mr. Phelps. I submit the objection.

The Court: You didn't cover this in pre-trial?

Mr. Rank: No.

The Court: Well, that is when you should have covered it. Matters of record or something of that sort should have been covered in pretrial.

Mr. Phelps: I think we did, as a matter of fact.

The Court: Now you want him to testify to hearsay concerning it.

(Testimony of A. K. Wilson.)

Mr. Phelps: I think we did, but I won't press it, Your Honor. We will go right on.

The Court: I don't see that it is material anyhow.

Mr. Phelps: Very well, Your Honor.

Q. (By Mr. Phelps): Now, Mr. Wilson, at the time that you first entered into negotiations for the purchase of the land under the Ward contract, who was representing Mr. Ward?

A. Mr.—You mean the attorney representing him?

Q. Yes.

A. On this particular contract? [455]

Q. Yes.

A. Mr. Rank represented Mr. Ward and me also in this particular deal.

Q. And did you have any independent representation at all? A. No.

Q. Later did Mr. Rank represent you in connection with the purchase of the adjoining lands, the Sage lands?

A. Mr. Rank started to represent me in the spring or early summer of 1945. Mr. Rank helped me with exercising an option on the Sage tract that we exercised on June 15, 1945.

Q. And did he draft the Sage "B" Contract covering the lands that are in yellow in that other exhibit, east of the Ward lands here involved?

A. Yes, and he was the only attorney we had on that.

(Testimony of A. K. Wilson.)

Q. All right. When you entered into these negotiations for the sale or purchase by you of these Ward lands involved here in this suit, were you furnished any cruise for your use in determining what was on the land? A. Yes, sir.

Q. And what cruise was that?

A. That was the cruise known as the French cruise.

Q. And so far as you were concerned, Mr. Wilson, did that cruise play any part in your determination as to valuation and in arriving at a price—

Mr. Rank: We will object to that unless it is shown that [456] that cruise was furnished by Mr. Ward.

Mr. Phelps: The Percy French cruise—by whom was that cruise furnished to you, sir?

A. The French cruise—the whole book of the French cruises was furnished to me by Senator Ed Fletcher who was representing Mr. Ward in this matter and as a matter of fact, has an interest in it. He furnished me all of them at one time, and I am not sure whether Harold L. Ward ever did, but we had them with us during the discussions—at least photostats of the cruises.

Q. All right. At that time—I am now talking about May of 1946 and this particular area, sir—did you have an opinion or conclusion as to the reasonable value on a stumpage basis of the fir and redwood in that area?

Mr. Rank: To which we will object as immaterial.

(Testimony of A. K. Wilson.)

The Court: Are you dissatisfied with this contract? This is not a suit to reform this contract, is it?

Mr. Phelps: No, Your Honor, it is not. I just want to show the circumstances, the increase in value, and so forth——

The Court: What is the materiality? I assume that businessmen when they go into transactions like this, each one tries to make the best deal he can for himself or they wouldn't make it. But we have no problem, have we, with the validity of this contract?

Mr. Phelps: No, Your Honor.

The Court: Nor any problem as to whether it was provident [457] or improvident or any attempt to reform it?

Mr. Phelps: No, your Honor.

The Court: What is the good of going into that? I notice the other side went into some phases of that too, but I didn't see what that has to do with it. The parties went on under this contract for some time. It is their troubles later which we are concerned with.

Mr. Phelps: All right; it had been gone into and I wanted to show the rise in value.

The Court: For the purpose of showing the background; but whether it was a good or bad contract at the time, I don't think is material.

Mr. Phelps: That isn't my purpose at all. My purpose is to show, if your Honor please, that the

(Testimony of A. K. Wilson.)

stumpage figures set out in the contract allowed a margin of security and that the intention of the contract was always to provide a security to the vendor, and that is what this is, a security transaction pure and simple: That is my purpose and that is why I want to show it. But if your Honor thinks that I may not, I will make the offer——

The Court: I heard that mentioned before. Still I don't understand the importance of that point.

Mr. Rank: We haven't mentioned it, your Honor.

The Court: I don't see any importance. A certain figure was agreed upon. I suppose that is the figure the [458] parties agreed upon after some discussion between them, and there it is.

Mr. Phelps: If your Honor thinks I shouldn't, I will forego that line of questioning.

The Court: If you want to develop the witness' familiarity with the property in connection with any valuation testimony as of the time of the breach of the contract, that is a different matter.

Mr. Phelps: It will be part of that same thing and I, of course, will have to, when we come to that, develop his familiarity with sales in and around that area from that time up to the present time, so I will have to come to it eventually. I might just as well do it now.

The Court: I don't know about 1944. That is pretty remote.

Mr. Phelps: Well, '45.

The Court: '46, I mean. That is pretty remote.

(Testimony of A. K. Wilson.)

That is pretty remote as to the valuation in 1954.

Mr. Phelps: That is true, your Honor, but to show——

The Court: To show his general familiarity?

Mr. Phelps: General familiarity.

The Court: Go ahead.

Q. (By Mr. Phelps): Mr. Wilson, will you tell us very quickly and not in great detail, will you explain to the Court the extent of your knowledge in the general area of timber prices [459] and the timberlands in that area from, say, 1945 up to the present time? Don't give figures; just recite for the Court what you had to do with such lands with respect to purchase or sale or officer and so forth without figures, and very quickly, please.

Mr. Rank: Do I understand this is to qualify him to testify on valuation? Is that the purpose of it?

Mr. Phelps: It is to show his background. Later he will testify to valuation.

The Court: Well, let him answer. Go ahead.

The Witness: What was the question?

The Court: He wants you to tell the Court your general experience with these properties in this general area from 1945 on.

The Witness: When I first went down in that country in the summer of '44, I had a cruiser with me, and we spent a lot of time in Del Norte County, Humboldt County, Mendocino County and Trinity County. We drove many of the roads and spent a

(Testimony of A. K. Wilson.)

lot of time talking to everybody we could find that knew much about timber to try to determine whether or not we should enter that area, and drew some very definite conclusions that it would be a good area to enter. The prices for stumpage was very cheap, and looked to me like the prices would increase as more people wanted the timber.

So I made quite an exhaustive study of that, at that time, [460] and have been studying it ever since.

Q. (By Mr. Phelps): All right. On your behalf and on other companies who you represent, on their behalf, have you made purchases of timber, and if so, just give us not the amounts in dollars, but in footage.

A. Have you got that map, that map with all the areas there? That would be better. We could show in two minutes, what areas we acquired and how they were all related.

Mr. Phelps: I didn't want to take the time.

The Witness: It will take only a minute, Lou. We could do it much quicker that way.

Mr. Phelps: All right. You have seen the map?

Mr. Rank: Yes.

Mr. Phelps: It has been folded and unfolded many times.

Q. (By Mr. Phelps): Is this the map that you meant? A. Yes.

Mr. Rank: May I suggest that that be marked for identification, Mr. Phelps?

Mr. Phelps: Yes.

(Testimony of A. K. Wilson.)

The Court: Mark it.

The Clerk: Plaintiff's Exhibit 14 marked for identification.

(Whereupon, map referred to was marked as Plaintiff's Exhibit No. 14 for identification Only.) [461]

The Witness: All the land colored on this map, except this orange here, we acquired. The first tract we acquired was this green tract here, and this green tract there. We took an option on that.

Q. (By Mr. Phelps): How many feet in that?

A. 672 million feet. We took an option on that from the McCutchens, who had the option from the Ward people, Ward and Blue Creek.

Q. Is that Blue Creek and Ward property?

A. Yes, they owned it together.

Q. What is the next piece?

A. Right after we took that option in the spring of 1945, on April 14th, I believe it was, 1945, we took an option from the Sage people on all this pink section, which is about 347 million, I believe it is. That was \$1.25 a thousand, and the option on this was \$1.25 a thousand.

Then on the 4th of May we took an option from the Sage people on the yellow at \$3 a thousand. I had a verbal option from Harold Ward at the time we made this first deal that he would give us the first chance at this at a reasonable price when he wanted to sell it.

(Testimony of A. K. Wilson.)

Mr. Rank: We will ask that the last part be stricken as purely hearsay.

The Witness: Then on May 17th, 1945, we acquired this piece here, which had a saw mill on it, and with that we got [462] this green or blue timber up here, and also this part here (indicating). Then we later bought this piece from the Ward people. In fact, we still own most of this also.

Q. That is the Section 16 we have been talking about.

A. The Section 16 we have been talking about, that we started to log in April of last year. Then this over here was our Sage "C" contract, which we bought from the Sage people pursuant to an option made on May 4th, 1945, and this option to Sage, and this option to Sage, and this option to Sage were all exercised on June 15th, 1945. Then in May, on May 1st, 1946, we completed the agreement and signed the agreement for the acquisition of the timber in question now.

Q. Since then you have sold the land in pink, have you?

A. We sold the saw mill, we sold this, we sold this. The Save-the-Redwood League would not let us log this, and so we sold that to them, and what we call the "Big Ward Contract," it covered these two pieces here. We sold that to Simpson in 1948, and also the mill. And we now still have all of this, but this 17 and 18 in here, which is not colored, and all of this in yellow, and all of this in pink here. We have this whole area here. This is

(Testimony of A. K. Wilson.)

the identical map that was used at that time. I would like to get it back when you get through with it in the record.

Mr. Phelps: Will the Clerk please mark that?

Q. Since your original acquisition have you been following [463] the market price and the sales and transactions and dealings in timber in that area?

A. Yes, sir.

Q. Does that include right up to the present time? A. Yes, sir.

Q. You entered into this contract, then, if I understand it, on May 1st, 1946, and called for originally \$600,000. \$600,000 was the total price of one parcel, and \$150,000 was the total price of the other, do you recall that? A. That is right.

Q. How much was paid, if you can recall, on the contract before you removed any footage at all?

A. Paid \$25,000 at one time and \$40,000—an additional \$40,000, I believe.

Q. That would be \$105,000?

A. We were required to pay \$65,000, but we paid the additional \$40,000 because we did not start logging the following year.

Q. In addition to that, using your figures——

(To Mr. Rank): Can't we stipulate in addition to that that the amounts \$32,091.12, \$20,412.49, and an additional \$25,000 were all additionally paid subsequent to that and represented amounts in excess of stumpage payments actually made?

Mr. Rank: Yes, subject to my checking on that, but I [464] believe that is correct.

(Testimony of A. K. Wilson.)

Mr. Phelps: I am taking it off of your exhibit.

Mr. Rank: Yes.

Mr. Phelps: Incidentally, on this, Mr. Rank, we need to stipulate, too, because we left it open in the pre-trial conference. The item of \$8,370.96, which we could not determine whether it was this contract or the Sage contract, we have checked and found that that was on the Sage contract, so that the figure that we stipulated to on the pretrial conference can be as we indicated there and that item is omitted.

Mr. Rank: Yes. I believe there is a recap marked for identification in the pre-trial conference exhibit which carries the correct figures. That is pre-trial Conference Exhibit I, which we will introduce as an exhibit, and that truly represents the financial transactions between the parties on this contract, is that correct?

Mr. Phelps: With those figures that I just enumerated? That is correct.

Mr. Rank: I mean the exhibit I gave you.

Mr. Phelps: So far as I know. I have not checked it back. I have checked only those figures that I have just indicated to you. Let us go on.

Q. Mr. Wilson, when did Union first commence logging under this contract? First of all, when did Union commence logging at all? [465]

A. They started logging in Section 16 in April 1953.

Q. Section 16 is the section that does not show on this map? A. It shows right there.

(Testimony of A. K. Wilson.)

Q. That is in Township——

A. 13 North, Range 1 East.

Q. And that was in April, sir?

A. Yes, sir.

Q. Will you explain to the Court prior to April 1953 what was the routine method of reporting logs and timber removed from the lands and the method of payment? Just explain what the method was, sir.

A. Well, about 15 or 18 years ago we devised the system which was new in the industry, whereby we used one of these Whizz machines that makes four copies. The scaler would write on there the date, the name of the trucker, the section of land he was hauling for, the road that he came out, and the setting, I believe, and the link, diameter and footage of each log. That, and the brand of the log, on that slip, that scale sheet, while it still had the carbons in it, was signed by the scaler and by the trucker that was hauling the logs. I might say that many of the companies are using that now and have been for the last 10 or 12 years.

It provides a system whereby everybody who has anything to do with those logs gets a signed copy. As soon as the logs are scaled, the slips are torn out of the machine and the [466] scaler keeps the white copy, which is the office copy. He gives the other three copies, which are yellow, blue and pink, to the trucker. The trucker keeps one copy, I believe it is the blue copy, for his record, and that

(Testimony of A. K. Wilson.)

is the copy he gets paid on. That is his receipt that he hauled the logs.

The other two copies, the pink and the blue, he takes to the mill, and he gives the mill the blue copy, and then they have the receipt because that is what they are going to pay on, and he has the mill representative sign the pink copy which, with any corrections, if they think there is anything wrong with the scale, they make the corrections on the pink copy, and he brings it back—the log hauler brings it back to the scaler, and the scaler sends that down to the office, and either with the white copy, if it comes in promptly, it goes down to the office, or if it doesn't come in promptly, the copy goes alone. But it reaches the Arcata office, and those are accumulated through the month, and at the end of the month they are delivered or mailed to the stumpage owner.

Q. Some time prior to April 1953, was there an additional report that was prepared and sent on to the last owner, the Wards in this case?

A. About the same time I started this report I started a report that the scaler made out daily, which was a summary of all the logs hauled, and that report continued almost invariably—there were a few exceptions—almost invariably [467] up to the present time. There have been times when I did not get a copy of it, but ordinarily I got copies of it.

Q. You (simultaneous talking of counsel and witness)——

(Testimony of A. K. Wilson.)

Mr. Rank: I would suggest that the Reporter cannot understand that.

Mr. Phelps: You listen to my question and don't speak quite so fast, because the poor Reporter has to get it all down.

The Witness: You ought to have a tape machine helping.

Q. (By Mr. Phelps): I will show you what is a recapitulation sheet, Defendant's Exhibit J. Were these prepared?

A. This is not what I was talking about.

Q. I understand that, but this is what I was trying to ask you about. These were sent during the whole calendar year of 1953, were they?

A. Well, I don't know.

Q. You knew that those were being sent?

A. Ordinarily those sheets were sent, yes, but I didn't—I don't know if they were always sent, but they were ordinarily sent.

Q. Then how about the method of payment? How would you pay the landowner for the stumpage? How would you go about doing that? Just tell us.

A. I think our contracts with both Sage and the Ward people provide that we pay them on the 20th day of the month, following [468] the end of the month that the logs were removed, and we always liked to pay at that time, although there were many times we did not have the funds because we were building plants and building roads, and expanding, but that was the plan.

(Testimony of A. K. Wilson.)

Q. Mr. Wilson, what I want to find out from you, first of all, is how did you go about ascertaining the amount to be paid, and then how were those funds transferred?

A. I didn't understand that is what you were asking.

Q. I will try to be more specific in my questions.

A. Say that again what you want to know.

Q. Will you tell us, please, sir, when it came time for payment—and let us take the period of time in late 1952 and early 1953—when it came time for payment of the stumpage, how did you go about to ascertain the amount due and transfer the funds to the owner of the land?

Mr. Rank: What period of time are you referring to?

The Court: He is talking about before the Union Bond.

Mr. Phelps: Before Union Bond.

A. For a period of years I would call Paul Owens when I was about ready to make the payment and ascertain the footage that had been removed, whether from the Ward or the Sage land, would figure the stumpage—in fact, Owens would figure it. There is 1,340,000 feet at \$5 a thousand, there was so much stumpage, and then a check would be sent, either a company [469] check or a cashier's check, either from Portland or from Los Angeles. I believe there were a few times checks were sent out of our Arcata office several years

(Testimony of A. K. Wilson.)

ago. Ordinarily either out of Portland or the Compton office.

Q. All right, now, when Union first commenced logging, you said in April of 1953, and that was on Section 16, am I correct in that?

A. That is right.

Q. Township 13?

A. 13 North, Range 1 East.

Q. Was there any stumpage payment due on that land? A. No.

Q. On that occasion when you commenced logging there did you give any instructions to Mr. Owens with respect to the handling of the Union Bond & Trust Company logging in that section?

A. Yes.

Q. What were they, sir?

A. Well, first, I made an arrangement with him that he would handle the transaction for 25 cents a thousand board feet for the boards removed, just like he was handling the transaction for the Coast.

Q. At that time, incidentally, was he employed as an employee of the company or independent?

A. He was a public accountant at that [470] time.

Q. Did he have other clients? A. Yes.

Q. Was that financial arrangement, that is, the rate of pay, the same as the arrangement you had with Coast? A. Yes.

Q. Did you give him any instructions with respect to what records he should keep or what he

(Testimony of A. K. Wilson.)

should do with the pink slips or anything like that on Section 16?

A. Well, after I made the arrangements with him, that he would just handle the Union Bond & Trust Company business the same as the Coast business for the same money, I don't know whether it was during that phone conversation or another phone conversation, there was something brought up about what to do with the pink slips and who to pay stumpage to, and I advised him there was no stumpage due, that we owned that tract in fee, and as far as the pink slips were concerned, to put them aside. We would get them some time or advise him what to do with them.

Q. When was that?

A. Well, I don't know exactly, but it was evidently some time before May 20th, because then is when he wanted to know what to do with the pink slips. So it was probably some time in April or the early part of May.

Q. After the Union Bond & Trust Company commenced logging on the Ward and Sage properties, what was your understanding of the [471] situation as to how it was to be handled?

(Question read by the Reporter.)

Mr. Rank: I think we will have to object to that.

The Court: It calls for his conclusion. What did he do?

Q. (By Mr. Phelps): What did you do?

A. I didn't do anything.

(Testimony of A. K. Wilson.)

Q. Did you have any conversations with Mr. Owens after that?

A. We had many conversations.

Q. With respect to the handling of the Union Bond & Trust Company tickets, will you tell us whether or not you thought he was sending them on into Ward or whether you thought he was not?

Mr. Rank: If the Court please, what he thought at the time I do not know. I am trying not to——

Mr. Phelps: I think it is material, your Honor.

Mr. Rank: All right. Go ahead and let him testify.

The Court: It is not quite clear. Can't you have him go over what happened?

Mr. Phelps: I will withdraw that and approach it a different way.

Q. Mr. Wilson, during the spring of 1953, from April on, through the summer and into the fall, what were you engaged in personally? What were you doing?

A. Well, we had two companies under Chapter XI. I was engaged very strenuously in trying to work them out of Chapter XI. [472]

Q. What companies were they?

A. They were the H. A. Wilson Lumber Company at Compton, California, and the Coast Redwood Company at Arcata, California.

The Court: The Coast Redwood Company was the assignee of the Union Bond under this contract?

(Testimony of A. K. Wilson.)

A. No, they were not the assignee. They had cutting rights.

Q. You had a contract with them?

A. Yes, that is right.

Q. (By Mr. Phelps): Where did you spend most of your time?

A. Well, I spent a lot of time in Los Angeles. I spent some time in Portland. I spent a little time in Eureka. Sometimes there were months at a time I wouldn't even be there. In fact, the majority of my time was spent in Los Angeles because we were having weekly meetings down there in the court, every Wednesday, I believe it was. We would have meetings and we had to prepare for them, and there were months that I stayed there in Los Angeles.

Q. In the woods themselves, where the logging operations were concerned, did you make as many visits to the woods as you had before?

A. No, I think at one time there was five or six months I wasn't even in the woods. I would like to have been there, but I had these pressing things in Los Angeles and many other things and I was unable to go.

Q. When Union commenced logging on the Ward and Sage [473] properties, what kind of arrangement did you have at that time? How did you go about then determining the amount due under the contract and arranging for payment? What did you do then?

(Testimony of A. K. Wilson.)

A. Well, we didn't make any change from what the Coast Redwood arrangements were, the same general plan.

Q. What did you do then specifically? How would you handle it in the months of June to October, inclusive, we will say?

A. Well, all the time, every month, about the middle of the month, when we were going to pay either Ward or Sage I would call up Paul Owens and find out what logs had been removed during the month we were going to pay for and then send the payment to either Ward or Sage.

Q. When you made that payment for those months from June to October, inclusive, at the time you arranged for the transfer of the funds did you think at that time those payments were for all the logs removed during those months?

A. Yes, sir.

Mr. Phelps: Your Honor, I see it is 12 o'clock. May we take our recess now?

The Court: We had better resume at 1:30 then.

Mr. Phelps: That is fine.

The Court: We will recess until 1:30.

(Thereupon a recess was taken to the hour of 1:30 o'clock p.m. this date.) [474]

(Testimony of A. K. Wilson.)

November 26, 1954—1:30 P.M.

(Whereupon the witness A. K. Wilson resumed the stand and testified further on direct examination on behalf of plaintiff.)

Q. (By Mr. Phelps): Mr. Wilson, before the noon hour, you had said that you had made your original arrangements with Mr. Owens with respect to reporting and paying for the Union Bond logs in May, and then you told us that you had made no arrangements since. Will you explain to the Court why you did not give any additional instructions, please?

A. I made those arrangements either the last of April or early in May, and I did not give any instructions—I did not think it was necessary. He was thoroughly familiar. He had handled the Coast reports for years, and I presumed everything was in order.

Q. Did you know that the Ward logs that the Union Bond and Trust Company were logging from the months of June to October, inclusive, at that time were not being reported?

A. No, sir.

Q. Did you know that the Ward logs being logged from June to October by the Union Bond and Trust Company were not being paid for?

A. No, sir.

Q. Mr. Wilson, when did you first learn the possibility of the discrepancies here? [475]

(Testimony of A. K. Wilson.)

A. Along about the middle of February.

Q. What were the circumstances?

The Court: What year?

Q. (By Mr. Phelps): Yes. What year, sir?

A. 1954.

Q. What were the circumstances? What had brought it to your attention? What happened, and just tell us?

A. Well, I am not sure just how I did learn that the Ward people were claiming that there might be a shortage. It might have come from Owens, or it seems like I had a conference on the phone with Mr. French. Maybe I got it from Larry Fletcher. I am not just sure how I did find out that there was some discrepancy. But I didn't put any credence in it. I didn't figure we owed any money. We were paying about the amount we had normally paid, and I couldn't figure that we owed any money.

Q. Was there anything else that happened about that same time, either before, after or around that time that called your attention to the matter in any way?

A. Yes. About the same time I called Owens to see what money was to be paid for the logs moved in the month of November, and he said there was about eleven thousand feet of logs that had been removed and that would come to about fifty some dollars.

I said, "Paul, that can't be correct. I don't see how it [476] could. I believe we are logging some on the—" We had been logging some during No-

(Testimony of A. K. Wilson.)

vember on the Ward land and not all on the Sage land, or words to that effect.

I said, "You had better check that."

He checked and found that the Union reports—the report for the logs logged by Union were not included. That was purely the Coast report, and so I scolded him very severely for not being on his toes about it, and I asked him about the slips, if he mailed the slips.

Q. What month are you talking about now?

A. For November, because I was always scared that Paul would overlook getting the slips in. He has a lot of clients. He is a good accountant, but he is awfully busy. I think ordinarily he did get them in in a reasonable time, but I was always afraid that he might not. So I questioned him on the pink slips and told him he had better send in also the December slips, if he had them ready. He said he did. I told him to send them in, and he did—or advised me that he would, and later advised me he had.

Q. At or about that same time, Mr. Wilson, did you learn anything with respect to a check that Mr. French was making, W. W. French was making or intended to make?

A. Yes, Mr. French was going to make an audit or a check—I call it an audit because I figured it would be quite extensive to determine—there are hundreds and hundreds of [477] slips—possibly a thousand, a lot of them anyway, over the period of five months that were in question, so Owens advised me that French was going to make a check.

(Testimony of A. K. Wilson.)

It seems like I talked with French about it. I am not sure, but it seems like I talked with him on the phone. I practically live on the phone, have so many conversations I am not sure. It seems like I talked to French. He said he would go up and check the audit with Owens and then advise us.

“If we owe you any money we will pay you. I don’t see how we can, but if we owe you any money, we will pay you.”

Q. Did you thereafter ever learn whether Mr. French actually went to see Mr. Owens after this first visit to make that check with him?

A. Yes, I inquired of Owens if French had been back on one or two occasions, I recall, and he said he had not been back yet.

Q. So far as you were concerned, from your personal standpoint, did you have any reason to press that inquiry, or what was the situation then?

Mr. Rank: We will object to that as being entirely irrelevant.

The Court: Sustained.

Q. (By Mr. Phelps): Just tell us, Mr. Wilson, as time passed and Mr. French still had not gotten back to see Mr. Owens to check with him, what did you do? [478]

A. I didn’t do anything about it. I wasn’t in any hurry to find a discrepancy, if there was one. We were putting several thousand dollars a day of lumber into the inventory, and the longer it was before they found it out—if there was a discrepancy, they sent us a default notice, we would have 60 days

(Testimony of A. K. Wilson.)

after we got the default notice to cure the default, and I wasn't in any hurry to have them find out. But I didn't see how there could be because the figures looked right.

Then the main thing, if there was nothing wrong —Wards had a man there every day who knew all the logs that went out. They advised us of a few dollars discrepancy many times. If there was a big discrepancy they would have advised us, so I had no fear in my heart that there was a discrepancy at all.

Q. Mr. Wilson, you mentioned something about Sage logs and Ward logs. This is going back a moment, but it has not been brought out. First, the Sage lands and the Ward lands adjoining there, and there was logging in progress on both properties; that has been established? A. Yes.

Q. How about the arrangement for paying stumpage though to Sage? Was there any change in that situation about that time, in that time, in the summer of 1953?

Mr. Rank: Just a moment. I do not think you have established when Union started logging on Sage property, and [479] I think you will find it is much later than that.

Mr. Phelps: That is all of record here. We know when it was. It was the last week of June, 1953.

Mr. Rank: No, not Sage property. Isn't that what you asked him about? Paying stumpage for Sage? I think you will find he did not go into Sage

(Testimony of A. K. Wilson.)

until possibly after this period. If that is the case, then, this question is immaterial.

Mr. Phelps: I don't recall that that is the fact, but I am not going to take the time to find out. We can develop that over the recess.

Q. (By Mr. Phelps): Our question is, regardless of that, was there any change in the middle of the summer with respect to the payment of stumpage to Sage?

Mr. Rank: Just a minute, Mr. Wilson, by what company?

Mr. Phelps: By the company paying for the stumpage on the Sage "B" land, the Union Bond and Trust Company.

Mr. Rank: We will submit that that is immaterial unless it is established that Union Bond and Trust Company was logging on Sage at the time.

Mr. Phelps: It wouldn't make any difference. The question is how were they handling their stumpage payments. This property was all mixed up together. The question is whether there was any change in the stumpage arrangement at that time. Certainly one of the factors—— [480]

Mr. Rank: We will withdraw the objection, if the Court please.

Mr. Phelps: Will you answer the question?

The Witness: On July 1st we did not owe any more stumpage to Sage. We had been paying them every month up until that time, but that was the last annual payment. We did not have to pay them any more stumpage.

(Testimony of A. K. Wilson.)

Q. (By Mr. Phelps): Tell me, after stumpage payments were no longer required after July 1st, did Mr. Owens, who was handling this for Union, make any mistake with respect to those?

Mr. Rank: To which we will object as immaterial. If the Court please, the evidence shows that the Union Bond and Trust Company was not logging on Sage property at any time during this June to October period.

Mr. Phelps: I want to show, if the Court please, what was happening at this time, the manner in which it was done, to show that the mistake that was made here, how it was made, and so forth, and I want to show how in the ordinary course of things Mr. Owens, who was equally informed, kept paying until after he was not supposed to. If that is a fact, it is a fact that enters into the question of whether or not this was deliberate or not. The same man who made the mistake and did not pay, made a mistake and paid in the other instance. I think that is very material, if Your Honor please, in the [481] claims being made here.

Mr. Rank: Was it Union Bond and Trust Company or Coast Redwood? Union Bond was not logging Sage?

Mr. Phelps: I can't answer that question without referring to the records, but it doesn't make any difference because the stumpage payments were being paid by Union Bond.

Mr. Rank: I do not understand. If Union Bond was not logging on Sage——

(Testimony of A. K. Wilson.)

Mr. Phelps: Let us establish that.

The Court: Let him answer.

Mr. Rank: Let it go.

Mr. Phelps: Will you answer the question?

A. Owens kept right on sending the pink tickets to Sage right along, as I recall, for several months after July 1st, and some way I heard about it and I said, "You aren't going to send them any more tickets?"

He said, "Why don't you tell me what you are going to do?"

I said, "I supposed everybody knew that," and let it go at that.

Q. I take it from your answer that I was mistaken when I implied that there were payments after that?

A. One payment, only the pink ticket. Owens never made the payments.

Q. What was the next that you heard with reference to this [482] matter?

Mr. Rank: After what?

Mr. Phelps: Thank you, Mr. Rank. I will go back.

Q. (By Mr. Phelps): Mr. Wilson, you told us about the February or so arrangement and then Mr. Owens had told Mr. French to contact him and they were going to get together. What was the next thing that happened that you heard about? Any activity as far as checking the amounts due?

A. Well, I think the next thing after this February conversation, I think Mr. French was in the

(Testimony of A. K. Wilson.)

office to see Mr. Owens. Mr. Owens told me the next time I talked with him that he had been there. I think that was the next thing.

Q. And then after he had been in the office, is that the occasion then that he was to come back?

A. That is right.

Q. After that occasion, what was the next thing that you heard?

A. Well, a time or two after that, over a period of probably several weeks, a month or two or more, maybe longer, the matter was discussed with Owens, whether or not French—I think I asked him and he volunteered the information that French had not been back.

Q. Was there anything further as far as you were concerned prior to May 12th, the date of the letter of the termination?

A. Well, I don't recall anything further right now. There may have been other things, but I don't recall.

Q. Let us turn to the letter of May 12th, 1954. [483]

The Court: Is that included in your Exhibit 8?

Mr. Rank: I think it is the next exhibit, 9.

Mr. Phelps: It is part of Exhibit G of the pre-trial conference.

Q. Prior to receiving that letter of May 12th, 1954, signed by Harold L. Ward, attorney in fact, and Frederick S. Strong, Jr., did you receive a demand from Mr. Ward or anyone connected with

(Testimony of A. K. Wilson.)

the Wards, a specific demand for the payment of those amounts due?

A. I don't recall whether the letter came first asking some \$79,000 or some such matter, or whether it came after this. I don't recall now which came first. I wasn't in Portland and they came to the Portland office when I wasn't there.

Q. What letter are you referring to—the letter from Hardin, Rank, Cooper & Hayes?

Mr. Rank: Hardin, Fletcher, Cook & Hayes.

A. I don't recall who sent the letter, but we got a letter asking some \$70,000.

Mr. Phelps: Is that letter dated after——

Mr. Rank: May 13th, the following day.

Mr. Phelps: All right. Incidentally, Mr. Rank, let us put in evidence your exhibit here on the payments.

Mr. Rank: That is okay.

Mr. Phelps: I want to offer in evidence then, Defendant's Exhibit I on pre-trial for identification, and that can be [484] marked with your exhibit number if you want it to have your exhibit number.

Mr. Rank: It doesn't make any difference; they are all in evidence.

The Court: Defendant's Exhibit I introduced and filed into evidence.

(Thereupon, document "Recap of Financial Relations" marked Defendant's Exhibit I in the pre-trial conference, for identification, was received in evidence.)

(Testimony of A. K. Wilson.)

Mr. Phelps: And that exhibit, Your Honor, lists all the payments under the contract from the date of its inception and also shortly states for what the payment was, and the date.

Mr. Rank: And it is stipulated, Mr. Phelps, that the facts stated thereon are true?

Mr. Phelps: To the best of my knowledge they are. I certainly know nothing to the contrary.

Mr. Rank: Then for the record, I mean to avoid proof of it——

Mr. Phelps: Oh, you don't have to prove it.

Mr. Rank: That is it.

Mr. Phelps: The only reason I qualified that was that I haven't personally assured myself of the fact, that is all I meant to imply by that.

Q. After you received this so-called letter terminating the [485] contract, what happened up in the woods?

Mr. Rank: Well, we will object to this except insofar as he knows of his own personal knowledge, Mr. Phelps; it is my understanding that he wasn't there, he was in the east right after that.

Mr. Phelps: All right; I will ask the question and you can make your objections and we will see.

Q. Mr. Wilson, where were you, sir, immediately after May 12th, 1954, do you remember?

A. Well, I don't recall; I think somebody said here the other day I was in Chicago and New York; but if I was I had forgotten it, but I might have been. I know I wasn't at Eureka during the period right after that.

(Testimony of A. K. Wilson.)

Q. All right. Let us direct your attention to the period of May 14th, that Friday to the following Monday. Were you in Eureka then, do you remember? A. I don't think so, no.

Q. Were you in constant touch with your people in the woods or at least in Arcata at the mill at that time?

A. Yes, I talked to them on the phone a number of times.

Q. And how about the time when the roads were blocked and there were "no trespass" signs posted and so forth, where were you then, Mr. Wilson?

A. I think I was in San Francisco—in San Francisco during at least a part of that time. [486]

Q. All right. Now then did you give any instructions—I am asking you personally, did you personally give any instructions with reference to continuing in your possession of that land up there?

A. Yes.

Q. What did you do, tell me?

A. I told Mr. Doxie, the logging superintendent, I told Mr. Trotter, who was the construction foreman, I told Mr. Haney, who was the shop foreman, and Mr. John Brozwick, who was our bull bucking or cutting foreman.

Mr. Rank: Just a moment, Mr. Wilson. Is it established that these are Union Bond employees that he instructed? I don't think it has been established whose employees these are that he has instructed.

Mr. Phelps: Let him tell who they are.

(Testimony of A. K. Wilson.)

Q. Were these employees—some of them have been established——

Mr. Rank: Only Doxie, an employee of the Coast Redwood.

Q. (By Mr. Phelps): Were these other men—what were their duties or relationships up there? Do they have anything to do with the logging of this land? A. Yes, as I said——

The Court: He has already said what he did. Let's move along. Were they employees of Union or were they employees of somebody else?

A. They were employees of Coast Redwood Company but their [487] wages were prorated each month or each half month.

The Court: You instructed them to do what?

A. To pay no attention to any "no trespass" signs or any notice or blockades that were put up; that we were in possession; that they didn't have any right to terminate on any account; they would have to give us 60 days' notice that we were in default or to correct any other defaults they would have to give us 60 days notice, and not to surrender possession in any way, shape or form.

Q. (By Mr. Phelps): And were you forced during that period of time—during those few days were you forced to suspend any logging operations or to continue? What did you do?

A. Well, we didn't suspend any logging operations but they were greatly reduced. There was one day we didn't get any logs out, maybe one or two

(Testimony of A. K. Wilson.)

logs and we had been getting out 50 or 60 loads of logs a day.

Q. Will you state with respect to truckers you had up there, did you lose any truckers, or did you keep all of your truckers or what?

Mr. Rank: Just a moment. To which we will object as immaterial unless it is tied up with anything we did.

Mr. Phelps: As a result of the attempt to shut down——

The Court: Overruled. What happened to your truckers?

The Witness: A lot of them went and found other jobs.

The Court: When? When? [488]

The Witness: Right when Mr. Rank talked to them.

Mr. Phelps: All right.

Mr. Rank: Just a moment, please. We will ask that that last statement be stricken from the record, "When Mr. Rank talked to them." There is no testimony that Mr. Rank talked to them and this witness——

The Court: How soon after the barricades were put up did these truckers leave?

The Witness: Then we started losing—we lost some every day.

The Court: How many did you lose altogether?

Mr. Rank: During what period?

A. We lost about half our truckers there.

The Court: How many is that?

(Testimony of A. K. Wilson.)

A. We had about 30 or 40; 35, I presume.

Q. You lost about 15?

A. About half of them.

Q. Within how long a period of time?

A. Within about a week or four or five days.

The Court: Go ahead.

Q. (By Mr. Phelps): All right. Now at that time you were operating, were you not, through contract loggers, or how were you operating?

A. Everything was contract; both Coast and Union was all contract loggers at that time. [489]

Q. All right. By that you mean what is commonly known in the trade as gyppo loggers?

A. Yes. I don't believe the Union started their actual logging themselves until after the first of November, but I wouldn't be sure about that, but I don't believe that we did.

Q. Did anything else happen as a result of the efforts there to oust you physically out of possession?

A. I called Mr. Hanley, owner of the Hanley Lumber Company.

Mr. Rank: Just a moment; we are certainly going to object to any conversation between this witness and Mr. Hanley or the Hanley Lumber Company.

Mr. Phelps: No question about that, Mr. Rank.

The Court: I don't think that is what he means.

Mr. Phelps: I don't want to get any hearsay conversation in.

The Court: All right; ask him another question.

(Testimony of A. K. Wilson.)

Q. (By Mr. Phelps): Did you lose any employees? A. Yes.

Mr. Rank: Is that confined to Union Bond & Trust Company?

Mr. Phelps: Union Bond & Trust or employees of the contractors that were logging for Union Bond & Trust.

Mr. Rank: We will object to that as being immaterial unless they were employees——

Mr. Phelps: How about contract loggers logging for Union Bond & Trust? [490]

Mr. Rank: It doesn't make any difference what contractor loggers are thrown out of work. What difference does it make as to the case?

Mr. Phelps: I will submit the objection.

Mr. Rank: How does he know anyway?

Mr. Phelps: Well, in order to shorten this, I will have another witness on this, and I will pass this subject for the time being, reserving the right, if necessary, to call him back at a later time. Let us pass on to another matter.

The Witness: I would like to correct a statement that I made a minute ago.

Mr. Phelps: What is that?

The Witness: I was thinking about the period down through October when I said that all of the logging was being done by contractors, but we are talking about May.

Q. Yes?

A. Well, in May Union Bond & Trust Company

(Testimony of A. K. Wilson.)

were conducting two operations, one on the Ward land and one on the Sage land.

The Court: You have got the years all mixed up.

The Witness: This year.

The Court: You weren't talking about June to October of this year, then?

The Witness: No.

The Court: You were talking about the period in April of this year when the barricades were put up? [491]

A. That's right. I was going back to last year, see.

Q. You weren't operating then under these contracts?

A. We had contract loggers during that time, but I thought that was when he was trying to fix the time, from June to October, but he was talking about May and I didn't state it right. I was going back to the previous year, see.

Q. (By Mr. Phelps): So as to make it perfectly clear, in May, 1954, was Union Bond & Trust Company operating in addition to the contract loggers? Did they operate besides, themselves?

A. Yes.

Mr. Phelps: I have found that letter of May 13th.

Q. I show you a letter, Mr. Wilson, and ask you if that is a letter you received from Carlson A. Rank dated May 13, 1954?

A. I want to qualify that last statement. Union Bond & Trust Company was operating with their

(Testimony of A. K. Wilson.)

employees, but the Coast Redwood Company was paying them and every payday the Union Bond & Trust Company was paying Coast Redwood the actual amount of the labor.

Q. That is a detail?

A. I want it to be correct.

The Court: I thought it was stipulated this letter was sent and received?

Mr. Phelps: Is it? I don't think it has been.

Mr. Rank: I don't think it was mentioned, but it will be [492] stipulated.

Mr. Phelps: All right; it will be stipulated that this letter was sent and received.

The Witness: We received it.

Mr. Phelps: We offer it in evidence as Plaintiff's Exhibit next in order.

The Court: That is the notice of default?

Mr. Rank: That is a letter that followed the notice of default.

The Clerk: Plaintiff's Exhibit 15 introduced and filed into evidence.

(Thereupon, letter identified above was received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Rank: It is a letter, if Your Honor please, billing for the logs they had removed to date.

The Court: After the notice of default?

Mr. Rank: Yes.

The Court: Or before?

(Testimony of A. K. Wilson.)

Mr. Phelps: After the notice of default, and sets forth the specific amounts on the second page.

Next, Mr. Rank, so we will avoid the hearsay objection, I have a letter that was sent to Mr. Lane.

Mr. Rank: Yes.

Mr. Phelps: I think you gave me a list of others to whom a similar letter was sent. [493]

Mr. Rank: Yes.

Mr. Phelps: We will offer in evidence this letter dated May 14, 1954 signed by Carlton L. Rank addressed to Mr. E. Lane in Eureka. We offer that in evidence with a stipulation that in addition to Mr. Lane similar letters were sent to the following people: The referee in bankruptcy in Los Angeles, California Barrel Company, the Arrow Mill Company, Sage Land & Lumber Company, Dean Langford, Roscoe Denny, Jack McManus, chairman of the Creditors Committee for Coast Redwood Company, E. Lane, R. Pollard, O. C. Simpson, J. Byrne, J. Robbins, F. Fisher, and George Severson.

Now, Mr. Rank, perhaps you can do this more quickly than by questioning the witness. Can you identify for us who these people are for the record and include that in the stipulation, that is, starting with Dean Langford, Roscoe Denny and so forth?

Mr. Rank: Dean Langford, as far as I know, was a contract logger; Roscoe Denny was a contract logger; E. Lane I believe was a contract logger; and the rest of the names I believe are trucking operators.

(Testimony of A. K. Wilson.)

Mr. Phelps: Pollard, Simpson, Byrne, Robbins, Fisher and Severson were truckers?

Mr. Rank: I believe so. That was my information.

Mr. Phelps: All right.

Q. Now, Mr. Wilson, when you entered into the negotiations [494] for the purchase and sale of these Ward lands back in 1946 from Mr. Ward, did Mr. Ward say anything to you with respect to rights-of-way?

Mr. Rank: May we place the time and date of this conversation?

Mr. Phelps: Yes.

Q. If you had such a conversation or conference will you please state where, and when, and who was present, first.

A. Well, we didn't have any conference that I recall at that time, at the time we made this contract, regarding right-of-ways.

Q. When did you have a conference or conversation with Mr. Ward with respect to rights-of-way? Tell us when, first. When did you first have it?

A. In the spring, either April or May, of 1945, in Sacramento at the Senator Hotel when we were negotiating for the purchase of the Sage-Ward contract which was timber acquired a year earlier.

Q. All right. Who was present?

A. Just Mr. Ward and myself.

Q. And what was said?

A. I asked Mr. Ward if he had rights-of-way

(Testimony of A. K. Wilson.)

over the Sage land because the Sage land was between all of his land and the highway, and he said that he and Sage Land & Lumber Company had a reciprocal right-of-way agreement that covered all the [495] land that they had, that they both owned in Humboldt and Del Norte Counties.

Q. All right. Did you have any further conversations about it with him?

A. Well, I don't—the only one that comes to my mind at this time was when we were considering building the road up Blue Creek, and I remember a conversation at that time, but I don't know——

Q. When and where, if you can state?

A. Well, that conversation was on the telephone and he was in Orchard Lake, Michigan.

Q. And what was it? What was said?

A. I told him that we wanted to build a road up Blue Creek to take out the logs in the Blue Creek watershed, which is what is pink on this map here, that we had acquired from the Sage people, and he had told me that he wanted to help pick out the right-of-way. He told me that previously because there was some nice groves of trees along the Blue Creek and he didn't want them disturbed any more than necessary.

The Court: Mr. Holter testified here you wouldn't give him a right-of-way over your property; is that right?

A. No, that isn't right.

Q. He was not telling the truth?

A. Well, I wouldn't say anybody was not tell-

(Testimony of A. K. Wilson.)

ing the truth, but we got in a big heated discussion with him over rights-of-way [496] at one time here.

Q. And you didn't refuse to cooperate and give him a right-of-way over your property in consideration of rights over theirs?

A. Well, no, he had already given me his before I had any——

Q. But you didn't refuse to give him one?

A. No; no, he wasn't trying to get any right-of-way for himself; he was trying to get rights-of-way for other people that he didn't mention. What he wanted me to do was just to give rights-of-way to anybody that had timber on past there. There are a lot of Indians back there owned 40 acres each, and I said to Mr. Holter, "Do you think we should give you a blanket right-of-way that could be assigned or just throw it open to the public so that anybody that has got even 40 acres can have the use of our roads and use of our rights-of-way without any compensation and a man that is irresponsible can go in on 40 acres and create a fire hazard and maybe burn up the forest?" We had just got through a fire that cost between half and three-quarters of a million dollars that started on one of our operations, and we wasn't interested in letting anybody in. I said, "If you have got anybody that wants a right-of-way I will be glad to talk to them." And I am, and that holds good right now; but we are not going to throw the whole country open to jeopardize what I have been working for

(Testimony of A. K. Wilson.)

all my life, just to any irresponsible person [497] that we don't even know who it is, in advance. In fact, I have got some deals on right now for one man that has got absolutely no way except through our property.

Q. (By Mr. Phelps): The map that we have here shows a number of roads on the Ward and Sage lands, all these roads in through here and so forth. Now first of all, on the Ward lands, first of all we will establish who built and paid for these roads.

A. This road here is an access road that was built down to about in here by the Federal Government—was being built at the time we made the deal. The Government——

Mr. Rank: Which deal, may we ask?

The Witness: The deal for the Big Ward Contract.

Q. (By Mr. Phelps): The one above?

A. Yes. That was up here and it came down this way. In fact, it had come through here, and that is why we had to have the rights-of-way from Sage to get to Ward and vice versa over here to get to the Sage land, and the Government spent over a hundred thousand dollars on this piece of road here. It still wasn't a good road, and in '48 when we weren't logging in there at the time—we had sold out our green logs—we spent between thirty and forty thousand dollars improving that one particular right-of-way, and then we built all these other roads. We have got over 50 miles of

(Testimony of A. K. Wilson.)

roads in there, and this is about four miles of access road, something [498] like that, and we have got about 50 miles. I think about 30 miles is good gravel road that can be hauled over any time of the year no matter how rainy it is, and the others are summer roads, they are roads lightly graveled.

Q. (By Mr. Phelps): What was the cost of those roads? A. Well——

Mr. Rank: We will object to that as immaterial unless it is shown that Union Bond & Trust Company spent the money to improve the roads.

Mr. Phelps: I don't think it is immaterial on that basis, if it added to the value of the land no matter who did it.

Q. First, let us establish the primary question: Who put the roads in on the Ward land?

A. Union Bond and Trust Company built part of them and the Coast Redwood built part of them.

Q. Have you any idea of the proportion, the relationship that Union Bond & Trust Company built?

Mr. Rank: Just a moment; to which we will object as not being the best evidence. [499]

The Court: If the witness knows he may answer.

The Witness: The Union Bond and Trust Company built this road here, which is a very hard piece of construction. They built that road, and they built this road here (indicating on map). They started some place up here and went to down there. And then they built this road from here

(Testimony of A. K. Wilson.)

clear on out to here. Then they improved this road here and built some other roads up in here.

Q. (By Mr. Phelps): And the balance of them by Coast?

A. The balance of them were built by Coast Redwood Company.

Q. Confining yourself to the roads on the Ward lands themselves, what was the cost of those roads?

Mr. Rank: To which we will object as immaterial unless it is shown that Union Bond and Trust Company built the roads. It has not been shown.

Mr. Phelps: It does not make the least bit of difference whether Union Bond and Trust Company, Coast, or some third party did, if it added to the value of the land.

The Court: Who would build the road in there except the people interested?

Mr. Rank: Coast Redwood was doing all the logging.

Mr. Phelps: He said Coast Redwood built the balance of the roads.

Mr. Rank: Our objection is that anything a third party might do—— [500]

The Court: Coast was doing the logging for Union, was it?

Mr. Rank: Coast was doing the logging, certainly, but the Coast is an entirely separate corporation. The answer is that Union Bond and Trust Company did not spend a nickel for those roads in there—maybe in the last few months, but not during the period of time that he is talking

(Testimony of A. K. Wilson.)

about. Mr. Wilson so testified in his deposition. Union Bond and Trust Company had nothing to do with the construction of the roads, as I recall.

The Witness: May I say something about those roads right now? It is very material.

The Court: I do not know how material it is to this matter, except it goes to one of the equitable considerations that may be involved.

Mr. Phelps: The improvements.

The Court: I will take the testimony.

The Court: Did the Union pay for this itself? Answer that yes or no.

A. They paid for the ones they built themselves, and the ones Coast built, they gave them credit on stumpage, sold the stumpage cheaper so they would build the roads. It is the same as the Union. If the Union got seven or eight dollars for stumpage——

The Court: How much did these roads [501] cost?

Q. (By Mr. Phelps): How much did the roads cost?

A. The roads cost from our property, I would say, are about \$400,000, for the roads that actually cross the Ward property and lead out to the highway, that road system, not counting anything on the Sage back of the Ward, is about \$400,000.

Q. That includes the roads out west?

A. Yes, it is all paid for indirectly by the Union Bond and Trust Company. Either there is money or allowance on stumpage.

(Testimony of A. K. Wilson.)

Q. Mr. Wilson, will you resume the stand again, please?

With respect to these roads again, can you tell us whether or not any of these roads have any particular importance as an outlet to timber beyond and as the most feasible outlet to timber beyond?

Mr. Rank: May I hear that question?

Mr. Phelps: I will reframe it.

Q. (By Mr. Phelps): Will you tell us, Mr. Wilson, whether or not any particular road indicated on there is important as an outlet, as the most feasible outlet for timber beyond it, west of it?

A. It is east of it. Almost all of those roads are. They fan out like that, and they tap other areas of timber. We have an offer now of \$80,000 for the use of one of the roads to bring out forty million feet of timber.

Mr. Rank: We will ask that that be stricken as immaterial. [502]

The Court: It is a voluntary statement. It may go out.

Mr. Phelps: May I go into it? I was going to inquire the person, the footage, and so forth.

The Court: All right.

Q. (By Mr. Phelps): Mr. Wilson, are you familiar with what is known as the Paulson Timber? A. Yes.

Q. Where is that?

A. It fits right in here. It is right in this area here (indicating).

Q. How many million feet are there in that?

(Testimony of A. K. Wilson.)

A. I think down here, according to the cruise, about forty million feet.

Q. Have you been approached in the last two or three months with respect to an endeavor by the person representing the Paulsons or having an interest in that timber to obtain the rights-of-way over your roads?

Mr. Rank: To which we will object as immaterial and incompetent insofar as this witness is concerned, and hearsay.

The Court: Of course, as to whether they were approached or not——

Mr. Phelps: Has an offer been made to you of \$2.00 per thousand for the removal of that timber over your land? A. Yes.

Mr. Rank: Just a moment. We ask that the answer go out [503] subject to the objection. To which we object as immaterial, and if there is such an offer, the offer speaks for itself, or the document speaks for itself.

The Court: Is it in writing?

The Witness: No, but I can get it in writing.

Mr. Rank: What is the answer? That he can get it in writing?

The Court: That is a hearsay statement. I will strike that. There is no doubt, however, that there would be some value attached to these roads for other timber operations.

Mr. Rank: It depends, if the Court please, on many, many circumstances.

Q. (By Mr. Phelps): In addition to that forty

(Testimony of A. K. Wilson.)

million feet in here, is it also many, many millions of feet beyond on the other side of the river which could be reached by what is known and referred to as the Ah Pah access road?

A. That could be reached by all these roads as the only feasible way to take the timber out. There is about two billion feet in back of it.

Q. Without stating amounts or anything, just for the record, may we establish this, sir: Will you state whether or not there is a value that the land has simply as roads for access to timber beyond?

A. It has a tremendous value for that.

Q. Do you have an opinion and conclusion, sir, based upon [504] your experience there, as to the value?

Mr. Rank: To which we will object as being immaterial and incompetent as far as this witness is concerned, and the question, I do not believe, is based upon any foundation for testimony as to value.

Mr. Phelps: This man is the owner of the land. He is entitled to testify.

The Court: Yes, but you do not say when. Your question is so general. What are you trying to find out, whether the witness has an opinion as to the value of this property at the time of the notice of default?

Mr. Phelps: I will object to it differently, your Honor. Let us take them up one by one.

The Court: Fix the time.

Mr. Phelps: First, as to the 14 forties down

(Testimony of A. K. Wilson.)

there in the virgin timber, Mr. Wilson, will you state whether or not you have an opinion as to the reasonable market value that a willing purchaser would pay for the 14 forties in the Ward contract as of May 12th, 1954?

Mr. Rank: My objection to all testimony as to value still stands.

Mr. Phelps: So stipulated.

Mr. Rank: We will further object that this witness has not shown a qualification to testify other than as the owner of the land as to market [505] value.

The Court: I think there is sufficient qualification to make the testimony admissible. Weight is another matter. You may answer.

Q. (By Mr. Phelps): What is the value as of May, 1954? A. \$625,000.

The Court: That is the virgin piece?

The Witness: Yes, sir.

Mr. Phelps: That is the virgin piece.

Q. (By Mr. Phelps): Will you state whether or not in the last month or two you have had an offer in that amount?

Mr. Rank: To which we will object as being immaterial to the establishment of value. They must show the terms, the conditions and so forth.

The Court: I will sustain the objection. That is hearsay on the matter of value. If there are any actual transactions that have taken place, they might be competent as the basis for the opinion.

Mr. Phelps: All right.

(Testimony of A. K. Wilson.)

Q. (By Mr. Phelps): How about the logged over land, have you an opinion as to its reasonable value as of May 12th, 1954, and if so, what is it?

Mr. Rank: To which we will object as being immaterial and incompetent. This witness has not shown any qualification or any information or knowledge that would qualify him to testify as to the value of the logged over land. [506]

The Court: I think there you would have to qualify him somewhat as to his knowledge of the actual conditions on logged over property.

Q. (By Mr. Phelps): Mr. Wilson, are you familiar with logging operations in general in that area? A. Yes, sir.

Q. And are you familiar and have you had experience with salvage operations?

A. Yes, sir.

Mr. Rank: Is this in redwood salvage operations?

Q. (By Mr. Phelps): Are you familiar——

A. You have two questions: One, familiar, and—how did you say it?

Q. I have forgotten it.

A. I am familiar with salvage operations, but I have not operated salvage operations. You see, you asked two things at once.

Q. Thank you so much.

On a salvage operation, would you explain how the timber on the logged over lands would be recovered?

A. Well, in 1948, when we sold the Simpson,

(Testimony of A. K. Wilson.)

that big tract of Simpson, we reserved a corner of it, ten acres right here.

The Court: This is taking too much time.

The Court: What is the technique of salvage; how do you do it? [507]

The Witness: You haul it to a mill that was close, or you have a portable mill or semi-portable mill that is close, so you do not have to go out on the highway and haul big loads. You save most of the \$14.50 hauling, that we have hauling them to a mill.

The Court: Could you do that in this piece?

The Witness: Yes, very practical.

Q. (By Mr. Phelps): Could it be done, sir, from the existing roads or would you have to build any additional roads?

A. You do not have to build any roads to log what has been logged.

Q. If done in that way, to such person, what is the value of logged over land in your opinion as an owner?

The Court: Did you see this land in the condition it is now in at any time since the notice of default?

A. Both before and since. I have been over every road through it.

Q. You have been over the road since the notice of default? A. Both before and since.

Mr. Rank: May I ask one question of the witness so far as qualifications are concerned?

Mr. Phelps: Yes.

(Testimony of A. K. Wilson.)

Q. (By Mr. Rank): Mr. Wilson, have you cruised the logged over land so as to have a record of the quantity of merchantable [508] logs?

A. Do you mean have I cruised it personally?

Q. Or had it cruised for you?

A. Yes, I have had a spot check cruise made of it.

The Court: Is that the one by Mr. Bunting?

A. No.

Mr. Phelps: No, it is a witness that will come later, if your Honor please.

The Witness: I have talked to two cruisers who have been over practically all the roads and over the land and are very familiar with it. They are good, competent cruisers.

The Court: Proceed with your examination.

Q. (By Mr. Phelps): Now, sir, what is your opinion as to the reasonable market value of the logged over lands in its present condition as of May 12th, 1954, this salvage timber?

A. This salvage timber would be worth around \$7,000. At least that much.

Q. When you say \$7,000 do you mean on a stumpage, footage basis?

A. Yes, on a footage basis, \$7,000 board feet. That is with free use of the road, granting free use of the road. It is the roads that help make that value.

The Court: Didn't Mr. Bunting give some testimony as to the amount?

(Testimony of A. K. Wilson.)

Mr. Phelps: No, that was all on virgin that he gave his [509] testimony on.

Q. (By Mr. Phelps): I should have asked you: On the virgin timber under the Percy French cruise, approximately how many million feet were there?

A. Approximately forty-one million feet.

Q. Forty-one million feet of virgin.

Mr. Phelps: Rather than getting into hearsay, I will have evidence of the number of feet on the logged over land, your Honor.

The Court: You have been in the lumber business a long time?

A. Almost twenty years. It will be twenty years next August.

Q. This is a pretty valuable piece of property and is still valuable?

A. It is what I have been working for most of my life. Yes, it is.

Q. Why did you get so slow in your payments? I should think if you had something valuable you would be cautious to see that a technical person on the other side wouldn't have any opportunity to make claims?

A. We knew they were trying to get this without——

Q. I do not want any argument. I want to find out if this is so valuable, why you got so far behind. I notice in these lists you got way behind in your payments. [510]

A. But we always mailed it before the default, or before the end of the default. There never was

(Testimony of A. K. Wilson.)

once that we missed that. We were building two different plants, and it took all the money. We had a fire that cost us between one-half and three-quarters of a million dollars in 1952. We are lucky to be in existence.

Q. (By Mr. Phelps): Will you explain that fire? What did it cost you?

A. In August, 1952, there was a fire that started in this area here someplace. I won't take the time to show which road it was, one of our logging operations.

Q. Just very briefly.

A. It kind of exploded. It started all over the country. They couldn't get it stopped. It ran over three thousand acres of land. We had twelve to fifteen bulldozers fighting the fire. We had four or five hundred men. The mill was shut down. Their crew of 100 men was up there fighting the fire. The neighbors came in to help fight it.

Q. What were the suppression costs for that fire?

A. I don't know what the suppression costs were, but the actual suppression was not so much. The big loss was in our felled and bucked timber. We had, I suppose, twenty or thirty million feet of timber there——

The Court: When was this fire?

The Witness: In August, 1952. Where two logs laid across [511] each other, it burned big holes in them.

Q. I know, but, Mr. Wilson, you were behind

(Testimony of A. K. Wilson.)

before that. I am not deciding the case now, but I am trying to find out why, with this valuable property here, you were taking three or four months to make payments even before this fire, relying on your right to get this period of grace?

A. That was part of the contract. We were building these two plants. We have two million dollars in plants in Los Angeles. It cost us two million dollars to build them.

Q. Is that accepted practice in the logging industry under these contracts that, traditionally, the vendee takes advantage of the grace period?

A. No, we didn't like to do it. We did it only when we had to. We were on needles and pins all the time. Timber was most valuable when put through a mill, and it was taking all of our money to build the mill, then build the roads and develop it.

Q. I am only asking you these questions because you wouldn't be sitting in that chair now if you kept up these payments and there wouldn't be any opportunity for a lawsuit.

A. If we had known, we would have kept it up. We had enough money going through our hands from which we could have made the payments.

Q. That is probably inherently your procedure, due to your manner of doing business and your involvement in other matters. [512] You can't shove your troubles over on somebody else. You would not be sitting in this chair now. Am I not right?

A. That is right, that is right, but we certainly didn't know it or we certainly would not be sitting

(Testimony of A. K. Wilson.)

here, I am telling you that. We would have let somebody else go or something else go instead of letting this go. And on this fire, when two logs crossed each other——

The Court: I probably brought some of this on. This is an equity case. You have taken a lot of time and I am trying to get at the heart of it. That is the only way I can decide what is right. We might take a recess.

(Recess.) [513]

Q. (By Mr. Phelps): Mr. Wilson, with respect to the December taxes, will you explain the situation that existed in December, 1953, with respect to taxes and the payment that you made at that time and the subsequent payment afterwards in May of 1954?

A. Well, in December, 1953, we paid some twelve or thirteen thousand dollars taxes, as I recall.

Q. I beg your pardon?

A. I said in December, 1953, we paid something like twelve or thirteen thousand dollars worth of taxes.

Q. What were those taxes, according to your understanding?

Mr. Rank: To which we object as immaterial, "according to his understanding." What were they for?

Mr. Phelps: It is a question of what he understood them to be.

(Testimony of A. K. Wilson.)

A. They was for the real estate taxes on all the Ward property.

Q. And at that time when you made that payment did that payment include the first installment that was due in December, '53? A. No.

Q. All right. At the time that you made that payment did you believe that there was included in that figure the amount for the December, '53, taxes?

Mr. Rank: To which we will object as immaterial. [514]

The Court: Did he believe that what was included?

Mr. Phelps: That the first installment December, '53, taxes were included in the amount that you paid, or did you know? Don't answer it because there is an objection.

Mr. Rank: I think that it was immaterial what he believed.

The Court: Well, what are the facts? What happened?

Q. (By Mr. Phelps): You were in default——

The Court: Who brought it to his attention? What did he say? What did he do?

Q. (By Mr. Phelps): Well, what did you do in 1953, December, with respect to paying the taxes, Mr. Wilson?

A. We paid about twelve or thirteen hundred dollars in taxes which we thought were all the taxes we owed on the whole Ward property includ-

(Testimony of A. K. Wilson.)

ing the first half of the taxes that were due at that time.

Q. And later did you learn that the taxes for 1953 first installment were not included in that amount? A. Yes, sir.

Q. I show you a letter of May 26th, 1954, and ask you as of that date—withdraw that for the moment.

After the notice of termination of the contract did you then make a tender of payment to the County Tax Collector of Humboldt County?

A. Yes, sir.

Q. And using this to refresh your recollection, can you state [515] when that letter was sent?

A. Well, on May 21st.

Q. And at that time what was the amount of your tender of taxes? A. \$3,835.55.

Q. All right. And it was returned to you by this letter of May 26th, 1954, from the Tax Collector to you; is that right? A. Yes.

Mr. Phelps: We will offer this in evidence together with the check as plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit No. 17 introduced and filed into evidence.

Mr. Phelps: By this letter, your Honor, at least in the reply, you recall that he refused to accept your remittance as the amount due was then \$9,080.96, which amount would not change until July 1, 1954.

(Testimony of A. K. Wilson.)

(Thereupon the letter identified above was received in evidence and marked Plaintiff's Exhibit No. 17.)

Q. (By Mr. Phelps): Mr. Wilson, how did you arrive at that figure, the amount of the check that you tendered?

A. Well, when we got this statement from the Ward people that we owed \$79,000 according to their figures, they had a figure on there of sixty-six hundred, some such matter, as the taxes on the property. So as I recall, I took half of that and added what I thought would be penalty and interest and sent it in. [516]

The Court: Was there some letter that went along with this check to the Tax Collector?

Mr. Phelps: Yes.

Mr. Rank: He just asked for a copy of that letter.

The Court: It may be that the Tax Collector refused to accept it because it was tendered in full payment of the taxes.

Mr. Phelps: Mr. Rank asked about that and I told him I would produce that for him. I want to put it in evidence and I will do that, but I didn't want to take up the time of the Court to do that at this time.

And incidentally, may it please the Court—

The Court: You are not taking up the time of the Court in doing that. I don't think that that

(Testimony of A. K. Wilson.)

has any particular value unless the full circumstances surrounding it are shown.

Mr. Phelps: May it be admitted subject to producing the other letter? I will undertake to produce the other letter. And in addition to that, Mr. Rank, unless you have them readily in your hands, I want to produce the letters tendering certain payments since May 12, 1954. If they are here in these exhibits that you have, I don't want to duplicate them.

Mr. Rank: No, I think I have all those letters and correspondence here.

Mr. Phelps: Why don't we put them in by stipulation as [517] one exhibit when you locate them?

Mr. Rank: Yes, they are all handy.

Mr. Phelps: And it can be stipulated that the amounts tendered after the notice of termination were those amounts set forth in the letters and the tenders were made as set forth in the letters.

Mr. Rank: Yes. We won't stipulate that it is a tender. We will stipulate to the facts shown by the correspondence with our replies; they may all go in as one exhibit.

Mr. Phelps: Certainly. We will do that at the close of this session, and I would like also at the close of this session an opportunity to go over all these documents and see what is here and what is not, and then we can clean up any tag ends between us as to those matters.

Subject to that, then you may cross-examine.

(Testimony of A. K. Wilson.)

Cross-Examination

By Mr. Rank:

Q. Mr. Wilson, just one matter to clean up first: You testified that at the time of the negotiation of the May, 1946, agreement that I or my firm represented you as well as Mr. Ward.

A. Not your firm, just you.

Q. That I represented you as well as Mr. Ward?

A. Yes.

Q. And that you had no other attorneys representing you in [518] this matter?

A. That's right.

Q. Did you have any other attorneys employed by you?

A. We had attorneys in Oregon, but they didn't know anything about California law and were not consulted in this matter.

Q. Were they consulted in any contracts?

A. I don't recall them being consulted.

Q. Mr. Wilson, I show you a letter to Mr. Ward or Ward Redwood Company dated May 22, 1945, enclosing several other letters, copies of opinions and so forth and ask if that is your signature and if you sent that letter and the enclosures?

Mr. Phelps: May I see that, Mr. Rank?

Mr. Rank: Excuse me; may I show it to your counsel first?

A. Yes.

Mr. Phelps: I haven't seen these letters; they are single-spaced documents——

(Testimony of A. K. Wilson.)

Mr. Rank: I am just going to identify them.

Mr. Phelps: All right; because we want to see them before you offer them.

Q. (By Mr. Rank): I hand you that letter and the enclosures and ask you if that was sent to Mr. Ward at the time or approximately the time stated on the letter?

A. Yes, I think those—I don't know whether I gave them to Ward or gave them to you. [519]

Q. That is your signature, is it not?

A. Oh, yes, that is my signature.

Mr. Phelps: Are those all in '45?

Mr. Rank: Yes, they are all '45. I think I will tie them up.

Let us mark these for identification as Defendant's Exhibit.

Mr. Phelps: I want a chance to read it if it is going to be used for any purpose at all, because I haven't had a chance to read all those.

Mr. Rank: The contents of these are not going to be used.

The Clerk: Defendant's Exhibit AA marked for identification.

(Thereupon, letter and enclosures, May 22, 1945, were marked Defendant's Exhibit AA for identification.)

Mr. Rank: If the Court please, this letter to Mr. Ward reads as follows:

“When we discussed——”

(Testimony of A. K. Wilson.)

Mr. Phelps: Just a minute. Is this the letter that you just marked for identification?

Mr. Rank: Yes, it is.

Mr. Phelps: You are not going to read it into evidence?

Mr. Rank: I am going to read it to the Court at the present time, yes; I think I am entitled to. [520]

Mr. Phelps: It isn't in evidence and I haven't had a chance to see whether there are any objections to it. Are you going to read all these letters?

Mr. Rank: No, I am not going to read the other letters; I am just going to read the top one. The reason I am not offering it in evidence at the present time, the record is getting pretty badly cluttered and I don't think it is necessary to have it in evidence. [521]

Q. (By Mr. Rank): This is the letter that you sent to Mr. Ward, is it not, Mr. Wilson, reading as follows: The date of this letter is May 22nd, 1945, which was at the time you were negotiating with him the revived Big Ward agreement.

A. That is right, the original contract.

Mr. Phelps: That is not the assignments.

Mr. Rank: No, not the assignments.

Mr. Phelps: What is the materiality?

Mr. Rank: I think I will tie it up, with the Court's permission.

“When we discussed the matter of us paying for your timber on a basis of \$4.00 per thousand feet stumpage, you brought up the question that this

(Testimony of A. K. Wilson.)

probably would affect the income tax you would have to pay, and I told you I would, if possible, obtain legal opinions regarding this.

“When I got back to Portland I wrote a letter to Carl Davidson enclosing a copy of the proposed contract which I had signed and handed to you for the consideration of your companies. Enclosed is a copy of my letter to him and also his reply.

“Mr. Carl Davidson is considered by many of the timber men in Oregon to be the leading income tax expert in Oregon so far as the timber industry is concerned, and he is consulted by many of the biggest [522] timber owners and timber operators there.

“I also wrote the same letter to the firm of Yergen and Meyers, Certified Public Accountants of Portland, Oregon, enclosing copy of the proposed contract. Mr. Meyers of this firm has handled our tax matters for close onto fifteen years and enjoys a very excellent reputation. I hand you herewith copy of our letter to them and their reply.

“I also wrote the same letter to the law firm of Hampson, Koerner, Young and Swett, enclosing copy of the proposed contract. This firm is one of the leading law firms in Portland and they are attorneys for the Southern Pacific, Union Pacific, Montgomery Ward and many other big corporations. Mr. Swett, who is one of the partners in the firm, handles the tax matters that are submitted to the firm. I also enclose copy of our letter to them and their reply.

(Testimony of A. K. Wilson.)

“If the proposed contract which has been referred to your companies in New York is not satisfactory to them in any of the details, I will be very glad to discuss with you and make any appropriate changes——”

and so forth.

Q. (By Mr. Rank): The Carl Davidson referred to there is an attorney in Portland, is he not? A. Yes. [523]

Q. He was one of your attorneys at the time and acted as such for several years afterwards?

A. We consulted him on tax matters principally. He is an attorney, he is a tax man also, and the principal reason we engaged him was for taxes. I don't think we ever took anything to him except tax problems.

Q. The firm of certified public accountants of Yergen and Meyers was your accountants and still are? A. That is right.

Q. The law firm of Hampson, Koerner, Young and Swett were your attorneys at the time and have been continuously since and still are?

A. That is right.

Q. And they were at the time on May 1st, 1946, is that correct? A. That is right.

Q. You will recall, Mr. Wilson, that our firm on May 1st or 2nd sent you all of the contracts and documents going to the May 1st, 1946, agreement which you wanted to submit to your attorneys in Portland, Oregon, do you recall that?

(Testimony of A. K. Wilson.)

A. I don't recall that, no. It is possible, but I don't recall it.

Q. Did you finally return them to us in the latter part of June signed, and during that time did you not confer with your attorneys up there and had them go over the contracts? [524]

A. I don't think that is right. I don't have any recollection, but I do want to straighten out one thing, that this letter, or the contract referred to there, was not the contract that was ever signed. That was a contract that I was led to believe would be signed, but never signed at all.

Q. It was a contract that you drafted, was it not?

A. I didn't draft it. Mr. Ward and I—your firm passed on that contract—I signed it and Mr. Ward said he would recommend wholeheartedly his Board of Directors to approve it. I gave it to him all signed, the contract I wanted to make for \$1,050,000, as I recall; \$1,030,000, or \$1,050,000. He sent it back east. During all this time our option time was running. Then he came back and said he would not accept it, and we made a new deal for \$1,750,000, and an entirely different contract that didn't look anything like that that is referred to in that letter.

Q. You will recall, Mr. Wilson, the first time our firm was employed by you was in June or so, 1945, was it not? A. In June, 1945?

Q. Yes, when you were negotiating your first options with Sage?

(Testimony of A. K. Wilson.)

A. That is about right. I know that you helped me to exercise that option on June 15th, 1945, so probably June 1st, 1945, a year before the contract we are now talking about.

Q. You recall the circumstances under which we were employed, [525] do you not, as a result of the conference between Mr. Ward, Mr. Fletcher, and you in our office?

A. I don't recall that, but that was probably right. If you say it is, that is all right with me.

Q. Do you recall at that time you asked Mr. Ward for permission to use our firm for some matters you were taking up with Sage?

A. That is correct.

Q. Mr. Ward replied to you it was all right, with the understanding that in any matters between you and Mr. Ward, we were representing Mr. Ward, do you recall that?

A. I don't recall just that, but that might have been your understanding.

Q. Wasn't it your understanding?

A. I don't know as it was at all.

Q. You recall our letter of withdrawal representing you in February, 1949, do you not?

A. No, I don't recall the contents of that letter.

Q. In which we stated to you that we were withdrawing from representing you because of a conflict between your interests and the Ward interests?

A. That was not the reason that you did not represent us any more.

(Testimony of A. K. Wilson.)

Q. Mr. Wilson——

A. That may be the written reason, but that was not the [526] reason.

Q. Mr. Wilson, why did you testify that we represented you in this Ward conference in that 1946 agreement?

A. If you want it, here it is. We were up in the Fairmont Hotel, Harold, you and I—nobody else—and you put on your Wilson hat for awhile and talked to me as my lawyer with your Wilson hat on. Then you would lay it down, and then you put on your Ward hat. You remember that, don't you?

Q. Was I representing you in the negotiations of the contract?

A. You were representing both of us. You had your Wilson hat on a lot of time and your Ward hat. Maybe you weren't representing me, maybe you hadn't, but I thought you were. This contract never was taken up.

The Court: Let us get on with this case.

Mr. Rank: Oh, yes. I just could not let that go. I am sorry. One other short matter.

Q. (By Mr. Rank): You testified to a fire loss you had in 1952.

The Court: I can see now why you are in Court; both sides, and it goes back to what I mentioned to you lawyers a few days ago.

Q. (By Mr. Rank): Mr. Wilson, calling your attention to your testimony, in response to the Judge's question of why you fell behind in some

(Testimony of A. K. Wilson.)

of your payments. You testified you had [527] a fire loss up there that ran a half million to \$750,000; that is correct, is it not?

A. That was one reason. We were building plants and also we were defaulting many times before then.

Q. Mr. Wilson, what loss, if any, did Union Bond and Trust Company sustain by reason of that fire?

A. Union Bond and Trust Company owned the timber.

Q. Then the only loss to Union Bond and Trust Company was damage to the timber, is that it?

A. Well, that was your principal damage, and also they helped to finance—the A. K. Wilson Lumber Company and the Coast Redwood Company.

Q. Mr. Wilson, do you recall sending a telegram to Mr. Fletcher on the date of August 15th, 1953, (and Mr. Phelps, it is in Defendant's F for Identification of the pre-trial conference) a photostatic copy of a wire, which I show you, and I ask you if you recall sending that wire, Mr. Wilson?

A. On this matter the Union Bond and Trust Company are not out anything. They put in their money into the A. K. Wilson Lumber Company and the Coast Redwood Company to help pull them through this fire loss.

Q. Do you recall sending that wire, Mr. Wilson?

A. Yes, sir.

Q. Do you recall the circumstances under which the wire was sent? [528]

A. Yes, sir.

(Testimony of A. K. Wilson.)

Q. Mr. Fletcher and Mr. Ward were after you to make some arrangement to deal with the fire situation at that time?

A. The fire was burning at that time.

Q. They had gotten in touch with you, had they not? A. Yes.

Mr. Rank: If the Court please, the wire reads as follows: I think I identified this as part of Pre-Trial Exhibit F. It is addressed to Lawrence Fletcher:

“Immediately after talking to you on the phone Wednesday afternoon, I called Frank Brickwedel on the phone. Yesterday morning early I called Jess Adkins on the phone and following your request gave Adkins full authority to settle any fire loss with the authorized representatives of the Blue Creek Redwood Company. I gave instructions to Mr. Adkins for him and all the other employees to give full cooperation to your representatives in order to work out a satisfactory settlement on the fire loss. I am sure the entire crew at Klamath will render full-hearted cooperation to determine the exact amount of loss of merchantable logs and timber caused by this fire. As I told you over the phone I was confident that the fire loss would be nominal and that in my opinion the actual loss in stumpage to Blue Creek Redwood Company would be only nominal and should not be in excess of [529] a few hundred dollars. After talking to Adkins at considerable length I am confident that I am correct in this respect I have had considerable

(Testimony of A. K. Wilson.)

experience with fire damages. They always look much worse than they really are. There has been any nominal damage to redwood timber felled and bucked on the SE $\frac{1}{4}$ of Section 18 and Section 30 the fire went through a considerable part of this felled and bucked timber. The fir has been logged by spier on SE $\frac{1}{4}$ of Section 19 and on Section 30, therefore the only loss could be redwood and that is very nominal. There is no felled and bucked timber on the E $\frac{1}{2}$ of Section 32 sound redwood logs are so full of water that very little damage is done to them by a fire of this type. If we are not careful we will both spend more money in trying to determine the amount of damage than the actual damage amounts to. This is my greatest concern."

The balance of the wire has to do with another matter which we will discuss.

Q. (By Mr. Rank): And Mr. Wilson, you sent that wire at the time of the fire, did you not?

A. Why don't you read all the wire?

Q. Mr. Wilson, we are coming into the balance of that. It has nothing to do with the fire loss, has it? It has to do with the facts concerning your payments. [530]

A. It also has to do with the fact that we were in default because we had been spending our money on plants.

Q. We are going into that, too, Mr. Wilson. However, you did send that wire concerning the fact that there was no damage up there?

The Court: 1952?

(Testimony of A. K. Wilson.)

Mr. Rank: Yes, August 15th, 1952.

Q. (By Mr. Rank): Is that correct, Mr. Wilson?

A. I sent that wire, yes.

Q. Were the facts stated in that wire true to your knowledge?

A. They were true to the best of my knowledge at that time. I was terribly mistaken, and it does not conflict with anything I have stated before. [531]

Q. Tell me, Mr. Wilson——

A. You asked me a question. Let me answer it, please. I did not realize that redwood logs would burn like they burn. The fact that there was very little loss of stumpage to the Wards was true and correct, because when two logs lay across each other in fire like that they burn great holes in them, and then the ends would burn out concave, or convex, like that. When you load those logs on the truck and haul them out, the scale of the logs is just the same. But the lumber you get out of it is shorter. Then you get a lot of short pieces, a lot of narrow pieces, and you have a tremendous amount of work trimming it out, and you wind up with practically no merchantable—well, a great deal less merchantable lumber. We were a long time selling our shorts that developed from that, and we took a tremendous loss on them. Our loss in the fire was a half million or three-quarters of a million dollars from that fire.

The loss to the stumpage owner was only—there wasn't any loss at all, because we were so far paid in advance that they would get all their money

(Testimony of A. K. Wilson.)

anyway. But the actual logs removed, there weren't many logs completely burned, or logs that did not scale the same when they went out of the woods, and that is the scale we paid on. We paid on the crew's scale. There was no conflict there. There is no conflict between that telegram and my testimony at all. [532]

Q. Coast Redwood was doing the logging, was it not? A. That is right.

Q. Where did Union Bond and Trust Company suffer any loss, Mr. Wilson? Explain that, please.

A. The Union Bond and Trust Company owned the stock of, the whole stock of the H. A. Wilson Lumber Company and Coast Redwood Company both, and they loaned money to the companies, and that fire loss and the flood the next January was the reason they both had to go into Chapter XI in January, 1953, just five months after that fire. Each one of those companies lost in excess of a quarter of a million dollars over and above depreciation, and they had been making money. Those are facts.

Q. Let us go to this right-of-way question. I understand that your testimony is that you had one conversation with Mr. Ward.

A. At least one conversation.

Q. Yes, prior to the May 1st, 1946, agreement.

A. Yes, sir.

Q. And that was some time in May or June, 1945? A. No, it was not that late.

Q. April or May, I believe you said.

(Testimony of A. K. Wilson.)

A. Well, it was in the spring. I think it must have been—yes, probably April or May, because we signed the contract on the 25th of June. I believe it was quite some time before [533] that.

Q. At the time you were negotiating with Mr. Ward on the big Ward contract, you had already purchased an option to that property, had you not?

A. Yes.

Q. That option was an option running to Hutchison and McCutchen? A. Yes, that is right.

Q. When did you purchase that?

A. As I recall, that was in February, 1945. I think it was February.

Q. Had you met Mr. Ward at that time?

A. No.

Q. Or Senator Fletcher? A. No.

Q. So when you were discussing these matters with Mr. Ward, it was after you had already purchased the option of the property?

A. It was after we had the option, yes.

Q. What did you pay for the option?

A. We paid \$10,000 and gave them a note besides.

Q. Totaling what? \$25,000?

A. I don't recall, something like that. It has been so long ago. It was on that order.

Mr. Phelps: Are these things material? I do not want [534] to foreclose you, but you are going into ancient history and details. I can't see the materiality of it at the moment, and I object on that ground.

(Testimony of A. K. Wilson.)

The Court: I do not see any particular materiality.

Mr. Rank: If the Court please, the materiality is this. I wanted to point out that Mr. Wilson already had an interest in this property and had acquired an option to it and was involved in it before.

The Court: Didn't Mr. Ward know that?

Mr. Rank: Oh, surely.

The Court: What is the difference?

Mr. Rank: Did Mr. Ward know what?

The Court: That Wilson had an option.

Mr. Rank: Oh, yes, he had already started purchasing the property, that is correct.

Q. (By Mr. Rank): You already had the option before this conversation, then, that you stated took place with Mr. Ward?

A. We had an option, but it was only a nominal amount on the option, and the option was not any good without rights of way. But I had no fear of getting rights of way when I purchased the option. In fact, I felt we could greatly modify the terms of the agreement because the Wards were about to lose it for taxes, and I know timber owners ordinarily will make a reasonable deal when they don't have money to pay the taxes. [535]

Q. During the negotiations you submitted to Mr. Ward an agreement that you prepared yourself, did you not?

A. I will have to see it to know that.

Q. I will show you a document, Mr. Wilson, and

(Testimony of A. K. Wilson.)

ask you if that is not an agreement that you prepared, yourself, and submitted to Mr. Ward for the purchase of the **Big Ward Property**.

Mr. Phelps: If your Honor please, this is another contract.

Mr. Rank: This is at the time he said he had these conversations with Mr. Ward about the reciprocal right-of-way, and all I am going to show is in the agreement that he prepared there are reservations of all kinds, but no reservations for a reciprocal right-of-way agreement with Sage. You see, it is our position and our testimony from Mr. Ward will show this matter was never discussed with Mr. Wilson.

The Witness: Let us face facts.

Mr. Phelps: We are going to encumber the record.

The Court: I still do not see that that has anything to do with the conversation on the subject. They may not have concluded an agreement. Do you mean that makes the conversation seem improbable?

Mr. Rank: For one thing, very definitely, yes, because if there was to be an agreement for rights-of-way, there would have to be a reservation in a contract or Mr. Ward could never [536] have gone through with it.

The Court: I do not quite see the importance of this phase of the matter.

The Witness: I did not prepare that contract.

The Court: I do not particularly see the value

(Testimony of A. K. Wilson.)

of these phases of the case. All we are concerned with is the value—you say that is a debatable question—if it has any virtue in the solution of this problem, it is a condition that existed at the time of the alleged default rather than the earlier considerations.

Mr. Rank: If the Court please, I am dealing now with the question of whether or not there was a reciprocal right-of-way agreement and whether or not Mr. Wilson thought it was enacted under it. That is all. It is just the reciprocal right-of-way point of the testimony.

The Court: I do not think that is particularly of importance. Maybe I have missed something in it. The problem is really essentially what to do with these parties as we find them now.

Mr. Rank: If there is any possibility, I do not want to leave the record in such a state that this Court might hold that there was a reciprocal right-of-way agreement or might take that into consideration in any equitable decree, because there was never any agreement, and it is our position that Mr. Wilson knew there was not and so acted all throughout the [537] terms of the contract. It certainly is not my desire to take up time here on matters unless they are material.

The Court: Your statement is that this supposed form of agreement did not have any provision in it for rights-of-way?

Mr. Rank: Yes, that is correct. At that time there was no reference to a reciprocal right-of-way.

(Testimony of A. K. Wilson.)

The Court: Go ahead.

Mr. Rank: May I ask the Court——

Mr. Phelps: What is the date of that?

Mr. Rank: I do not think it is stated. It is signed by Mr. Wilson.

The Court: It was in the spring of 1945.

Mr. Rank: The thing is, if the Court please, I do not want to take up time on this reciprocal right-of-way agreement if the Court thinks we should not do it.

The Court: We are in the process of making a record in this case and I do not want to make any ruling or make any statement that may lead the attorneys to think there is some indication on my part that they should or should not do anything. You have to present what you think is proper in your own case. That is your duty. I am trying rather informally to ascertain what the bearing of these earlier matters is.

Mr. Rank: Of course, the plaintiff in their pleadings have claimed that there was a reciprocal right-of-way agreement. [538]

The Court: We have pretty much the evidence on that, haven't we?

Mr. Rank: That is what I thought.

The Court: For whatever value it has. Maybe you will be able to point out that it has some true relevance in arriving at a decree in the matter. Maybe it has. I do not see that it has. If you would like me to make a statement concerning what I think you could do in this case outside of the

(Testimony of A. K. Wilson.)

record and feel that would be helpful, I will do so, but I do not want to do it if it becomes a point of the record and then have it urged as some suasion on the part of the Court that the attorneys on one side or the other should pursue or abandon some line of examination here.

Mr. Rank: It would be very helpful if the Court would do that.

(Discussion off the record.)

* * *

The Court: Suppose we take an adjournment until Monday at ten o'clock? If nothing happens in the meantime, we will go on with the evidence.

Mr. Phelps: Thank you.

Mr. Rank: Thank you.

(Whereupon an adjournment was taken until the hour of 10:00 o'clock a.m., Monday, November 29, 1954.) [539]

November 29, 1954 at 10:00 A.M.

The Clerk: Union Bond & Trust Company vs. Blue Creek Redwood Company, for trial, A. K. Wilson on the stand.

Mr. Rank: Ready, your Honor.

Mr. Phelps: Ready.

(Discussion off the record.)

The Court: Proceed.

A. K. WILSON

a witness called on behalf of the plaintiff, who having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

Mr. Rank: If the Court please, we would like to have marked for identification Defendant's Exhibit H in the pre-trial conference, and it would take Defendant's Exhibit H in this trial.

The Court: Defendant's Exhibit H.

Mr. Rank: And that is the folder containing all of the default notices other than the default notices attached to the Answer and Cross-Complaint, since January, 1950.

Have you a copy of this exhibit?

Mr. Phelps: Yes, I do have a copy.

The Clerk: Defendant's Exhibit H, marked for identification. [541]

(Thereupon folder of correspondence referred to was marked Defendant's Exhibit H, for identification.)

Mr. Rank: We also wish to have marked for identification—I will give a copy to counsel now—a schedule of the items in default and the dates and so forth, really a compilation from Exhibit H, for the same period of time. And it is for the aid of the Court. It explains and lists the defaults, what they were for, rather than having to go through all that folder.

(Testimony of A. K. Wilson.)

The Court: Has that been given a number yet?

Mr. Rank: No, that has not been given a number yet; that will take a new number.

The Clerk: Defendant's Exhibit AB marked for identification.

(Thereupon compilation based on documents in Defendant's Exhibit H for identification was marked Defendant's Exhibit AB for identification.)

Mr. Rank: Also for the benefit of the Court and also for identification, if the Court please, an analysis of the performance of Union Bond & Trust by years as to the payments, reports and delivery of scale slips, also taken from defendant's H, an analysis of the facts contained therein. I ask that that be marked for identification.

The Clerk: That will be Defendant's Exhibit AC marked for [542] identification.

(Thereupon the analysis referred to was marked Defendant's Exhibit AC for identification.)

Mr. Rank: I think also it might be well to mark for identification, if the Court please—and these can be marked as one exhibit—we have been talking about scale slips. I think it might be helpful to the Court if the Court had before it two actual scale slips. So I ask that there be marked as one exhibit, defendant's next in order, two pink scale slips.

The Court: For illustrative purposes?

(Testimony of A. K. Wilson.)

Mr. Rank: For illustration purposes, yes?

The Court: All right.

Mr. Rank: One for the month of November, a Union Bond & Trust scale slip, and the other for the month of October, a Coast Redwood scale slip, both from the Ward properties and containing thereon the information that has been testified to.

The Clerk: That will be Defendant's Exhibit AD marked for identification.

(Thereupon pink scale slips identified above were marked Defendant's Exhibit AD for identification.)

Q. (By Mr. Rank): Now, Mr. Wilson, what is the excuse for Union Bond & Trust's failure to pay for all of the logs removed from the Ward properties, say during the month of July, 1953?

A. We didn't know they removed any more than what we paid for. [543]

Q. That is your total excuse? That is the excuse?

A. Absolutely.

Q. And when, approximately, did you pay for the logs removed in July?

A. At that time we were unable to pay for them until just before our 60-day default notice expired, I believe. I think during that period we were paying for them just before the default notice expired.

Q. In other words, that would be in October?

A. Well, it would be—it would have been due the 20th of August. Yes, we would pay for them

(Testimony of A. K. Wilson.)

shortly before or about the 20th of October, is when I believe we paid for those.

Q. You just relate, if you would, the circumstances of how you happened to pay the amount you did on, I believe the date was the 21st of October, rather, Mr. Wilson?

A. I don't know the exact date. Just before the 20th of the month, maybe about the middle of the month, probably the 15th or 18th or maybe a little before then——

Q. Of what month?

A. Of October, just a few days before we were going to pay for them, or when we were about ready to pay for them, I would call Paul Owens and ask him the footage of logs removed and how much we owed, and he would tell me over the phone the footage of fir and redwood and what they totaled and what it figured at \$5 a thousand, and then we would both ordinarily multiply [544] the footage out by five, and then I would know what we owed and then I would call our Compton office and talk to Orville Paul and have him make the payments. That is the procedure we followed every month, and every month whether we paid right when they were due or whether it was paid after they were due during the default period, we followed the same procedure.

Q. Then if the record shows that the payments for the logs removed during July, August, September and October were made towards the end of the grace period, that would be October 21st for July

(Testimony of A. K. Wilson.)

logs, and November 24th or 25th for the August logs—you followed the same procedure, did you?

A. Well, I would call Owens just before we would pay for them, whether it was in the grace period or not, because that was the only way I ever got the information as to what was due.

Q. So if the record shows that the payment was made at the end of the grace period it would be a few days before that that you would call Mr. Owens?

A. Yes, that's right.

Q. And that is the procedure you followed all during the course of the contract?

A. Yes; sometimes we paid two or three months at a time, once or twice, when we had the funds available, that we didn't need to use for something else, we paid right up to date, see; but I would get that information from Owens at the time I was ready to make the payment. [545]

Q. The record shows, Mr. Wilson, that only two months during the entire period of the contract, namely the months of May and June, 1951, that you paid currently, that is, by the 20th of the following month. Is it your testimony that during the entire other period of some 51 or 52 months that at no time you had the money to pay on the due date?

A. I didn't realize that there was only one time we were current on the thing; I didn't realize that. [546]

Q. Two months, Mr. Wilson.

A. Two months, or whatever it was. But we were building these two plants and building roads. We

(Testimony of A. K. Wilson.)

were terribly short of money all the time. We had lots of assets—in fact, still have—but just very little ready cash. Our current position was limited.

Q. Now as I understand your answer to the first question that you gave, you gave the excuse, what it really amounts to, Mr. Wilson, does it not, to the failure to correct the default that had occurred on August 20th for the July lots, isn't that correct?

Mr. Phelps: Well, that is argumentative, if the Court please.

The Court: Yes.

Mr. Phelps: Calls for his opinion and conclusion.

Q. (By Mr. Rank): All right, Mr. Wilson. Please explain and give the excuse, if you would, why you did not pay for the July logs on August 20, 1953, when it was due under the contract?

A. Well, as I explained, we were, we had a lot of other things to do and we just didn't pay. We had the grace period, which we would like to never have had to use that, but you knew and Mr. Ward knew, when we went into this deal, that we only had a rather small down payment and we had to get the money out of the timber and out of the lands. Everybody knew [547] we didn't have the millions of dollars on hand to carry forth the program. In fact, it was often anticipated that we could never perform it.

Q. You were, in fact during this period of time, receiving each month, each week, the money for the Coast Redwood logs which you subsequently paid to the Wards. During the month of July you received

(Testimony of A. K. Wilson.)

that money, so you had that money on hand, didn't you?

A. No, no, that isn't quite right, Mr. Rank, at all, because when we started on, or way before that, Coast Redwood would never pay Union on time. You see, Union had to make the payments and Coast very seldom, if ever, paid Union Bond and Trust Company on time, up until in April of 1953. Then Coast started paying every week and they paid every week. That was, that follow pursuant to the Court order. But prior to that time they hadn't paid any stumpage for a long time, and when Hull had it, he didn't pay any stumpage for a long time, and Union had to dig up the money to pay, and that was quite a burden to them, to have to do that. So that the money that Union got from Coast in, we will say, July, which is—if that is the month you are talking about, they paid that to Ward, but they paid it on stumpage that that default notice was on. You see? If the current, if the contract had been, if Coast had been paying their, had always paid properly, promptly, Union could have kept promises, you see. But when Coast [548] started paying by the week, they were many months behind with their payments to Union, so Union used the current money to pay stumpage that was due from logs removed a hundred days back, you see.

Q. You also received during the month of July some 70, 80 thousand dollars or so from the sale of Union logs removed from the Ward properties, did you not?

(Testimony of A. K. Wilson.)

A. Well, I don't know just what it was, but we received a certain payment, a certain amount of money, yes.

Q. All right. What is your excuse for failure to send the reports for July by August 20th?

A. Well, Owens just didn't send them. He claims he didn't know that those had to be sent.

Q. Mr. Wilson, the record shows that during the 51 or 2 or 3 months we are talking about, the reports were only sent on time, I believe, 13 months. What is your explanation for that?

A. Well, it's just—the explanation is inefficiency in an office which—the inefficiencies of various companies, as you well know, you are very familiar with over a period of nine or ten years, were such. And I was spread out so far, I just couldn't get the proper efficiency, and was always afraid that they would slip up and really cause a serious embarrassment by not getting the slips in. But I was there very little bit and I was paying to have the work done, but it just wasn't being done. Now Owens, as I said before, he is [549] a very fine accountant and a very fine man, but he just always seemed to have a tremendous amount of work to do. He probably works an average of 16 to 18 hours a day, seven days a week, and has for the past two or three, couple of years, since he has had his accounting business. And prior to that time he was also a hard worker. But it just, they were just so busy, and they just didn't get it done. It's quite a problem, going into a new

(Testimony of A. K. Wilson.)

area like that and building up a big operation, when you are under-financed. It is a tremendous job, Other redwood companies have been a hundred years building their firms up, probably in very fine shape now, where they don't have to work only 40 hours a week, and the boss probably don't work that much.

Q. Mr. Wilson, we are talking about 1953, now, not '45 or '46.

A. Well, it's all the same. We never did get the things in the proper condition, as you well know that, and when I would be in Compton, why then there would be a lot of things that would go bad up north, and when I was in Oregon, they would go bad in all the California operations.

Q. Do you recall having a telephone conversation with Mr. Fletcher sometime in the middle of or latter part of June, 1953, wherein he told you that the Wards were very dissatisfied about the fact that you were receiving money each month from Coast Redwood and still not paying them on time? [550]

A. Yes, yes, I did, I remember that.

Q. And do you recall that Mr. Fletcher sent you a letter right after that conversation? I hand you a copy of a letter and ask you if you can recall that as being a copy of the original that you received, and to refresh your memory, the reply that you sent to Mr. Fletcher that I now hand you.

(Handing to witness.)

A. That, on this, in this letter here, Mr. Fletcher

(Testimony of A. K. Wilson.)

refers to Mr. Ward being upset about the taxes. I guess we were——

The Court: What is the question?

Mr. Rank: I just asked him to identify the letter, is all, if he recalls this being the letter.

The Witness: Well, I would like to say something about this.

The Court: Well, first of all, we have got to find out whether that's it or not.

The Witness: Yes, yes, I think I got this letter.

The Court: All right.

The Witness: I got the letter.

Mr. Phelps: What is the date of that?

Mr. Rank: That letter is June 25, 1953.

Mr. Phelps: All right.

Q. (By Mr. Rank): And under date of July 4, 1953, you sent the reply, the letter I now hand you?

A. Yes, I remember sending that letter. And I would like to [551] have that letter read so that——

The Court: Now Mr. Wilson, you have got a lawyer representing you.

The Witness: Excuse me.

The Court: And let him direct the examination where he wants it to be directed. Otherwise you may find yourself in the position of a man who has an unfortunate client, when you try to be your own lawyer.

Mr. Rank: I will ask that these two letters be marked as one exhibit for identification.

(Testimony of A. K. Wilson.)

The Clerk: That's Defendant's Exhibit AE, marked for identification.

(Whereupon two letters referred to were marked Defendant's Exhibit AE, for Identification Only.)

Q. (By Mr. Rank): Mr. Wilson, Mr. Fletcher in his letter, in addition to other matters, stated as follows:

"I confirm my telephone conversation with you of today. I merely wish to state that Mr. Ward is upset over the fact that you are receiving your payments weekly from Coast Redwood, but we are stilling running 60 days behind time."

In your letter of July 4th, with reference to this matter, after some explanatory comments, you stated as follows:

"Early in April, at the time Coast resumed [552] logging operations under the agreement between Union and Coast, whereby Union licensed Coast to log, we insisted that stumpage be paid to us every week so we could accrue for the Blue Creek payments. We didn't want to take a chance on them paying once a month and then not having the funds with which to make the payment to us, because if this happened, we would not have the funds to pay Harold within the sixty day period. We received a payment each week and accrue for the next payment that will be due within 60 days grace period. This means we are every month making a payment that should have been made sixty days before. We at

(Testimony of A. K. Wilson.)

least have the funds on hand to make the delinquent payment and are not taking the chance of not having the money prior to the expiration of sixty days grace period. Harold cannot be upset about this arrangement when he receives a copy of this letter and sees just how this has been planned and handled.”

Now you didn't mean, Mr. Wilson, or did you, that you actually accrued the cash and kept the cash on hand?

A. Well, no, the cash was not put in a separate pocket or separate fund. It was put in the regular bank account and then used to cure the default that had accrued, or that, on which there was default. Now if you had read the whole letter, you would have found that tied in with just what I said before [553] you handed me the letter. Everything I said, pretty near, is covered in that letter which I wrote a couple or three years ago, a year or two ago, and forgot all about it.

Q. Mr. Wilson, let's straighten one thing out. Is it your testimony that when you received cash from Coast Redwood for the month of July, that you kept that cash, or that cash on hand for 90 days? You don't mean to testify that, do you?

A. No, that isn't what I said at all. What I said, to be perfectly clear, was that Coast Redwood hadn't been paying taxes for several, or hadn't been paying the stumpage at all for months, and therefore on April 20th, the stumpage had to be paid that Coast had paid, had logged in January, I guess it would be,

(Testimony of A. K. Wilson.)

or December. So that money, as far as it went, that was received from Coast, because they had just started logging, went to help cure that default, and then on the 20th of May, the money Coast had paid in the approximate amounts, because it wasn't always the same amount, was, or had accrued and was available about the 20th of May or a little before, to pay a default that had accrued in January or February, because Coast had not paid before. So we were using all the money we got from Coast, in approximate amounts, at least, to cure defaults. But—or to pay stumpage. But because it wasn't a current stumpage, because the funds weren't available to pay the back stumpage. As I said in that letter, that we hoped in the fall to get in a position [554] where we could get current.

Q. You have testified several times in this trial that you were always short of money, building roads and plants. Let's inquire into that a little bit, Mr. Wilson. You testified as to several sales that you made of property. You testified that in 1948 you sold the big Ward contract to Simpson and how much did you receive for that, your equity?

A. Well—

Mr. Phelps: Is this material, your Honor?

Mr. Rank: We think it's material, very material. I think the Court will, too.

Mr. Phelps: Other transactions and other amounts, I think we ought to limit ourselves to the Blue Creek and Union.

The Court: Is that matter in issue in the case?

(Testimony of A. K. Wilson.)

Mr. Rank: Yes.

The Court: As to what money the plaintiff had?

Mr. Rank: Very material. This witness has been testifying all along that the reason he hasn't been making these payments is because he has had no money. He has had to build plants and he has had to build roads. We are just meeting that, and it is very material on the issue of wilful default or bad faith, and——

The Court: Well, it is not limited to—I mean, we can't go back and go over the whole period of contract relations. It isn't the fact that he didn't make the payments, [555] he was late in some payments along the road this contract went, as it is whether or not there was a failure to account for logs.

Mr. Rank: On his failure to pay and failure to account. Those are the specific defaults. Now we come to the question whether those defaults were wilful, whether he has had, has evidenced bad faith in the performance of the contract, in order for the Court to determine what type of an equity decree will have to be forthcoming. Now one of the material elements in determining whether it is wilful or not is the past conduct of the party under the contract and he has——

The Court: But there is no claim, as I understand it, that during the past, that there was any failure to account for logs.

Mr. Rank: Oh, no, no. There were defaults, continued defaults right along. You see, one——

(Testimony of A. K. Wilson.)

The Court: Failure to pay on time?

Mr. Rank: Well, that is a default, if the Court please. You see, one thing that hasn't been pointed out as yet, these excuses that Mr. Wilson has given for failure to pay for these logs is really an excuse of correcting a default, not for the default itself. The default occurred under the terms of the contract on the 20th of the following month. Now the excuse he has given isn't an excuse for the default.

The Court: Oh, I thought the contract provided that he [556] could cure the default within——

Mr. Rank: Sixty days.

The Court: ——sixty days.

Mr. Rank: Surely. That is an excuse for the failure to cure the default, not for the default itself. But getting away from the——

The Court: But that's not an issue in this case, is it, whether or not there was a valid excuse for using the grace period to pay?

Mr. Rank: The issue in this case is whether or not the default is wilful or in bad faith.

The Court: Not the default where the payment was made, but the default where there was failure to properly account for the logs that were logged.

Mr. Rank: For example——

Mr. Phelps: That is my point exactly, your Honor.

Mr. Rank: For example, this is the way we see the issue. Take the month of July, for example. On August 20th he went into default under the contract

(Testimony of A. K. Wilson.)

for failure to pay. Now does he have an excuse for that? A valid excuse which takes it out of the realm of wilfulness?

The Court: Well, I still don't see the materiality of what you are talking about. We have here a period which you gentlemen specified, from April until October, in which there was an incorrect report covering that period. [557]

Mr. Rank: That's correct.

The Court: Of logging.

Mr. Phelps: June to October.

Mr. Rank: June to October.

The Court: June to October. There was an incorrect accounting, and the question is, whether or not that, in equity—whether or not there is any valid excuse for that. Now we haven't got anything to do with anything prior to that, have we, where there was a correct accounting but merely late payments?

Mr. Rank: Well, the excuse that the witness has given——

The Court: All that would prove is that this plaintiff was trying to bite off more than he could chew, as sometimes happens, or for some reason or other was making use of the money, this money, for his own purposes; but eventually he paid it. So that the payments weren't made. And all that would be involved in that would be, maybe, there would be a consideration involved in that in an equity decree as to the use of the money and so forth, by way of interest.

(Testimony of A. K. Wilson.)

Mr. Rank: No, I think it goes beyond that, if the Court please.

The Court: I don't see what it has to do, particularly with the——

Mr. Rank: Well, under the cases, one of the elements that may be gone into in order for the Court to determine the [558] type of decree, that is, whether the decree should be based upon an innocent default, wilful default, bad faith, is the past conduct of the vendee under the contract, No. 1. That is one reason.

The Court: You say that that is stated in the decisions?

Mr. Rank: May I read one decision to you, if your Honor please?

The Court: In other words——

Mr. Rank: This is an expression of——

The Court: In other words, if one contracting party had been a bad boy for a long time before the events which give rise to the course of action——

Mr. Rank: That can be taken into consideration in determining——

The Court: ——that can be taken into account?

Mr. Rank: Reading a citation from one case, this is in Southwestern, it is not a California case, but it's common law:

“The evidence detailed showed beyond controversy——” May I give this citation? Crawford versus Texas Improvement Company, 196 Southwestern——

The Court: Is that in your memorandum here?

(Testimony of A. K. Wilson.)

Mr. Rank: No, it is not.

The Court: What did you say it was?

Mr. Rank: Crawford versus Texas Improvement Company, 196 [559] Southwestern, 195.

Mr. Phelps: Second? Southwestern Second?

Mr. Rank: No, 196 Southwestern.

The Court: Southwestern or -eastern?

Mr. Rank: Southwestern, 195.

“The evidence detailed showed beyond controversy that Crawford was persistently delinquent in the payment of his rent, but was he wilfully so? The rent installments are obligations which he was legally and morally bound to meet in advance on the first day of each month. When a man ought to pay, can pay and won't pay, this is sufficient to warrant a finding that his conduct is wilful. It evidences a bad motive and evil intention, especially when he persists in such conduct without adequate justification.’

The Court: Was there a period of grace in that case?

Mr. Rank: I can't answer that. But whether or not there was a period——

The Court: Wouldn't that be material?

Mr. Rank: Yes—no, no.

The Court: In other words, of what materiality would it be, if, under the terms of the contract, a 60-day period for payment was allowed and the obligor didn't pay until the 60 days and took advantage of that every time? What is there in that

(Testimony of A. K. Wilson.)

that bears equitably on a subsequent default that was a default under the contract? [560]

Mr. Rank: Well, his excuses——

The Court: Of course, if a man doesn't pay his rent at the time due there is no excuse. That will be in rent contracts usually. Some of the leases do contain some period for the curing of a default, but that is a little different, isn't it, than this type?

Mr. Rank: No, the theory of law is the same and the fact of the grace period doesn't make any difference insofar as determining the intent of the party.

Now let us take the testimony so far. One thing he has testified to as to the June to October period is that he did not have the money to make the payments, but he had some 88 thousand dollars for the logs he sold to Moore and the evidence certainly shows in the cash book that 20 or 30 thousand dollars was diverted for some other purpose to the Portland Los Angeles, or whatever it may be.

The other period of time when he has testified several times that he always was short of money, you called his attention to that before, and he has always given the excuse he was short of money. So it is very material to meet those statements. He made the statement on the stand on direct examination, and I think we entitled to meet that one thing, in addition to the fact it is material in determining this question of intent.

The Court: Of course that came out in response to your question as to what his reasons or explana-

(Testimony of A. K. Wilson.)

tions are, and then [561] when he answered, then you want the opportunity to meet something that he says.

Mr. Rank: No, he gave those statements under direct. The question of whether he failed is material. He gave those statements at the close of his direct examination to his own attorney and also in answer to you on his direct testimony; he made that statement half a dozen times, or several times, in any event, that he needed this money for other purposes.

The Court: What you want to pursue now is an examination as to whether or not it is correct that he did not have the available funds to make these payments.

Mr. Rank: I am going to show the money and then in addition going to prove that he had money available from the operations and other income all during this period of time, and during the period of time under discussion. It goes back to 1950, '51, '52 and '53 and that leads up to his excuse for his failure to pay in '53 and '54.

The Court: If it has been brought out, I will allow him to answer that, but I don't think there is much importance to that.

Mr. Rank: Well, I don't like to insist upon a thing like this, but we have——

The Court: When people enter into deals they have to take people the way they are. They went along for a long time, and what we are really con-

(Testimony of A. K. Wilson.)

cerned with is the effect of the failure [562] to truthfully or correctly report during the certain period. That is really the ground of the question.

Mr. Rank: That is true. You will remember the witness testified that the reason he had used these funds that came in in July was because Coast Redwood had not been paying, they had been building up their account, and it is all in the picture. I believe it is extremely material to have this evidence in. This isn't before a jury, anyway, and it isn't going to take much time; and we think that it is a very impressive showing to counter what this witness has said.

Mr. Phelps: May I make one comment, your Honor? I think it is going to take time, because it necessarily means that I will have to go back over all these things that preceded June of 1953. And I think your Honor has placed your finger squarely on the distinction, the grace period. We find no difference in this situation than in the ordinary insurance policy that contains a grace period. The New York Life Insurance Company happens to carry some life insurance for me and I am sure they would be brought in to establish when I was in the Service that I used the grace period and used it constantly. I don't think that that is something that can be drawn into this litigation to show and reflect itself as to the default which is the failure to accurately report here. And it is conceded, Mr. Ward has admitted, that never before had there been any inaccurate reports. And that is the thing

(Testimony of A. K. Wilson.)

we are interested in; it is the [563] first failure to report, coupled with the failure to pay for those logs, and it is the only thing that is involved here.

And I submit, if your Honor please—I certainly don't want to argue it further—I submit to open it up and go back over the course of all this prior matter is a complete waste of time and useless and has no bearing on the issue the Court is going to decide.

Mr. Rank: We are not going back over a course of conduct; we are going to produce evidence counter to what this witness has stated on the stand.

The Court: If it isn't too extensive, I will allow it.

Q. (By Mr. Rank): All right, Mr. Wilson. How much did you receive from the Simpson Logging Company in 1948, for the sale of property?

A. About a million and three-quarters, I believe.

Mr. Rank: May we have the map that was produced by the plaintiff? I don't recall the exhibit number. It is easier to follow this.

Q. The one you just mentioned is the large green area at the top, is it not? A. Yes.

The Court: This was when?

The Witness: 1948. Yes, this and this.

Q. (By Mr. Rank): Then the following year, or a year or so later you made a sale to Big Tree, did you not? [564]

(Testimony of A. K. Wilson.)

A. Yes, about the same time.

Q. That sale included the Ward property—part of the Ward properties?

A. Only part of the Ward properties.

Q. How much did you receive from Big Tree in cash?

Mr. Phelps: Same objection, if your Honor please. Now we have to go back——

The Court: What year?

Mr. Rank: This is '48 or '49. I have seven items——six items——

Mr. Phelps: I know, but then you are going to be short with me when I have to go back and explain this, and I am embarrassed with the Court to proceed to try to do it.

The Court: I don't see what events back in '48 and '47 have to do with this case.

Mr. Rank: Not '47, if the Court please. We were starting in '48, and we go now to '50 and '51. If the Court please, we will show in that period of time Union Bond & Trust Company, principal, sold properties up there for which they received five and a half million dollars in cash. If that isn't material I don't know what would be material in this case.

The Court: Why is it material?

Mr. Rank: For the simple reason that it belies the statement that they were in need for money all the time to pay for plants and other items. It follows right up to the present time. [565]

The Court: Then that means we have to go into an analysis of this plaintiff's affairs, what he did in that period, what other deals were negotiated and

(Testimony of A. K. Wilson.)

what other ventures he went into. I am afraid that that carries us far afield.

Mr. Phelps: And I would have to prove the large fee Mr. Rank got for representing him in these matters.

The Court: It would involve an examination of all his transactions. We are getting far afield. You open the door and your opponent isn't going to sit quiet——

Mr. Rank: Oh, yes, he will sit quiet on these deals. He won't go into that I am sure.

The Court: You can't tell unless you are familiar with all of his financial affairs.

Mr. Rank: No, I am not.

The Court: He may be in a position to show what he did with all that money, what other ventures he went into and I will have to have a special master appointed to have an accounting in order that I may get at the correctness of his statements as to whether or not he needed the money for other purposes. I think that gets us too far involved. I know what it is designed to do. It is designed to show that you don't believe that this plaintiff was fair and proper and accurate in his dealings; that he was trying to take advantage of you all down the line. You want to go back and show every transaction that he had other than with you and show its relationship to the [566] matter; that he had other money with which he could have done these things, so instead of trying one lawsuit I will have to try about eight or nine lawsuits.

(Testimony of A. K. Wilson.)

Frankly, Mr. Rank, I can't see the materiality of that in this action. And after all, I don't think that I am called upon to try the whole background and the history and the story of this transaction, whether Mr. Ward is a better man than Johnson, or Johnson is a scallawag. I am being very frank here. The only question that this Court should concern itself with is whether under the terms of this contract there was the kind of a breach that calls for an equitable judgment that is favorable to the Ward people and unfavorable to the company which the witness on the witness stand represents.

And I don't think I should get myself involved in going into the history of all these transactions in the past.

Mr. Rank: May we shorten this, your Honor? If I understand the objection is sustained, I will make an offer of proof.

The Court: At this point in the evidence I don't think it is material and I will sustain the objection.

Mr. Rank: Then I will offer to show, if the Court please—and this is to be an offer of proof——

Mr. Phelps: I think this is the vice of the thing, if your Honor please. He is going to make an offer, and I suppose I am in a position where I will have to explain, even though I don't want to explain these things, because it all can be [567] explained.

The Court: If it is an offer of proof, it doesn't make any difference.

Mr. Phelps: All right, your Honor.

The Court: All right, so the record may be clear.

(Testimony of A. K. Wilson.)

Mr. Rank: Yes. In addition to the \$1,750,000 to which the witness referred in 1948, we offer to show in the following year, I believe—I am not sure—that from the sale he testified to to Big Tree he received a hundred thousand dollars cash; and in 1950 from another sale of some of the properties up there to Mutual Plywood he received approximately \$500,000; in 1951 he sold the so-called Ward and Sage tract to Ralph Hull and he received a million dollars cash in 1951; and in 1951 he sold the property which is shown in pink in the upper right-hand corner to M. & M. Woodworking Company for \$1,917,000, making a total, if the Court please, of approximately five million dollars that Union Bond & Trust Company as the principal recipient received during that time from the sale of those properties. That is the end of the offer of proof.

The Court: Yes. I sustain the objection on the grounds I have stated.

Q. (By Mr. Rank): One thing further to clear up, Mr. Wilson. Prior to April, 1953, do the books of Union Bond & Trust show any investment in plant or roads? [568]

A. No, I don't believe they do. No, I don't believe they show it that way. Union Bond & Trust Company loaned their money to the other corporations that owned the plants and the corporations improved their own plants. I think that is the way it was.

Q. Let's get something straight for the record. Who owns the stock of Union Bond & Trust Com-

(Testimony of A. K. Wilson.)

pany? A. Union Mortgage Company.

Q. Who owns the stock of Union Mortgage Company? A. I own the stock, I believe.

Q. Who owns the stock of Coast Redwood Company?

A. I think the Union Bond & Mortgage Company holds the stock in Coast Redwood.

Q. Who owns the stock in A. K. Wilson Company?

A. I think the Union Bond & Trust Company holds the stock in A. K. Wilson Lumber Company.

Q. Will you name the directors and officers of each of these companies?

Mr. Phelps: Immaterial, your Honor.

The Court: Well, it might be. I don't see any harm in that.

Mr. Phelps: All right.

A. I am the president of all the companies; my wife is secretary of all the companies; and Mr. C. J. Walker, a retired attorney, is the vice president of each company. [569]

Q. (By Mr. Rank:) And who are the directors?

A. And we three are the directors.

Q. You three are the directors of each company?

A. Yes.

Q. As I understand, Mr. Wilson, the Coast Redwood Company was the company which operated the woods and the saw mill in the Eureka-Arcata area?

A. That's right.

Q. And the A. K. Wilson Company owned and operated the remanufacturing plant at Compton,

(Testimony of A. K. Wilson.)

California? A. That's right.

Q. And from that plant products were sold to the ultimate user?

A. I think maybe I answered the question about who owned the Coast Redwood plant. You didn't ask who owned the Coast Redwood plant. Union Bond & Trust Company owned the Coast Redwood plants.

Q. Yes; and you and your wife and this Mr.——

A. You know him very well.

Q. What is his name? A. Mr. Walker.

Q. Are the three directors of each of the companies? A. That's right.

Q. Who owns the stock in the Washington Lumber Company?

A. That stock, I believe, is owned by Mr. Springer, my [570] son-in-law, and Orville Paul, my nephew, and his wife.

Q. And who are the officers of that company?

Mr. Phelps: If your Honor please, is that material? They are not involved, as far as I understand it, prior to October, '53.

Mr. Rank: I think Mr. Wilson's testimony mentions the Washington Lumber Company.

Mr. Phelps: That is subsequent.

The Court: Let him answer.

The Witness: What was the question?

Q. (By Mr. Rank): Who are the officers?

A. Mr. Springer is president, Mr. Paul is vice president and his wife is secretary. I believe that is correct.

Q. And the A. K. Wilson Redwood Company?

(Testimony of A. K. Wilson.)

A. The same officers and directors, I believe, as near as I can recall, and stockholders as the Washington Lumber Company.

Q. While we are about it, the Ah Pah Redwood Company; who are the officers and directors?

Mr. Phelps: That isn't involved in any way here. I will object to that as incompetent, irrelevant and immaterial. They have absolutely no interest.

The Court: Has that been mentioned?

Mr. Rank: They have not been mentioned, but they happen to be all this time the owners of this Sage "B" contract, as far as we know, the property that lies east of the Ward [571] property that has been talked about as Union Bond & Trust property. That is a matter we will go into a little later, and I would like to clear it up now.

The Court: Let him answer.

The Witness: What was the question, Ah Pah?

Q. (By Mr. Rank): Who are the officers and directors?

A. I think the same as Union Bond & Trust Company.

Q. And International Pacific—what is the name of that company?

A. International Pacific Pulp & Paper Company.

Mr. Phelps: We are getting into a field again, if your Honor please, that I do not believe is material.

The Court: I do not see any harm in finding out who the officers are.

(Testimony of A. K. Wilson.)

Mr. Phelps: Counsel is not asking it for the purpose of this lawsuit. That is the fact of the matter; it has nothing to do with this lawsuit.

The Court: Let's get on.

A. The officers and directors as I recall, are the same.

The Court: As the Union Bond & Trust Company?

A. Yes, same as Union Bond & Trust Company.

Q. (By Mr. Rank): Now what excuse, Mr. Wilson—I don't think I have asked you this—what excuse have you for the failure to send, to mail the written reports required by the contract during this June to October period by the 20th of the [572] following month?

Mr. Phelps: That has been asked and answered, if your Honor please.

The Court: Well, I am not sure about that.

Mr. Rank: I don't think it has.

The Court: The previous question was with respect to payments.

Mr. Rank: I haven't reached that in my notes.

A. I object to the word "excuse"—reasons. We have reasons for things, not excuses.

Q. What was the reason for not sending——

A. The reason for not sending the pink slips?

Q. No, the reports, Mr. Wilson.

A. The pink slips are part of the reports. Is that what you meant—reports?

Q. My question is, what is your reason for not

(Testimony of A. K. Wilson.)

sending the monthly reports by the 20th of the month following the month that the logs were removed during this June-to-October period?

A. As I told you before, Mr. Ownes didn't think that the—the pink slips are the reports—that there were any reports due in that period—the pink slips are part of the reports—due anybody on anything that Union was logging because he thought that stumpage belonged to Union and there was no reports due. [573]

Q. You misunderstand, Mr. Wilson. I am talking about any reports for any logs removed.

A. Oh, you mean all the way——

Q. No, for this June to October period. Don't you understand me?

A. No, I don't understand you at all. I don't know what you mean.

The Court: He wants to know why the reports that were sent in, weren't sent in on time during this period.

Mr. Rank: That's correct.

The Witness: I answered that awhile ago. I said inefficiency in the office, or Owens not having the time to do it. That's just as simple as that.

Q. (By Mr. Rank): Now what is the excuse, might I ask, for the failure to pay for the other default with which you are charged, the failure to pay the taxes on 1953-54?

A. Well, which—you mentioned, Mr. Rank—Mr. Fletcher mentioned in that record, in that letter of Mr. Ward being upset about me not paying taxes.

(Testimony of A. K. Wilson.)

Please bear in mind, they were 15 years behind on taxes when we started paying them money.

Q. What is your excuse, Mr. Wilson?

A. Don't have any excuse, but I have a reason.

Q. All right, what is your reason for not paying it?

A. In December, the latter part of December, we paid, it [574] seems to me, like \$12,000 or \$13,000 or \$10,000 in taxes, and we thought that was all the taxes that was necessary to pay until the following spring. Didn't think we owed any taxes, that need be paid, in other words.

Q. I show you a copy of a letter from Mr. Fletcher to you under date of October 29, 1953, with an attached photostatic copy of a tax bill, 1953-54, and ask you if you recall receiving that.

A. Yes, I believe I received that. I am not sure, but I presume I did. If he said he sent it to me.

Q. Call your attention, Mr. Wilson to letter under date of October 29, 1953, enclosing a copy of a tax bill for 1953. That is so, is it not?

A. Yes. About two months after that was when we paid this \$10,000 or \$13,000,

Q. And it calls attention to the fact that the first installment is \$4,278.80, is that correct?

A. That was included. Yes, we knew we weren't paying the second installment, because that wouldn't be due until the following April.

Q. You though you were paying the second installment?

(Testimony of A. K. Wilson.)

A. Yes—no, we thought that was the first installment, was included. In fact, we thought that——

Q. Now I show you——

A. We thought that all taxes necessary to be paid were paid [575] the latter part of December.

Q. I show you copy of a letter under date of October 15, 1953, from Mr. Fletcher, with an enclosure, and ask you if you recall receiving that in the mail? A. Well——

Q. I think you were sent photostatic copies of the attached statements. (Handing to witness.)

Mr. Rank: Mr. Fletcher just made the suggestion, if the Court wants to take the recess now, we can let Mr. Wilson read this during the recess and save the Court's time.

The Court: We will take a recess now.

(Recess.)

Q. (By Mr. Rank): You have had a chance to go over these letters and documents, Mr. Wilson?

A. Yes, I looked over them.

Q. And you recall having received these?

A. Yes, I think I received them.

Q. Then you recall receiving on or about October 15th, the letter from Mr. Fletcher, to which is attached a statement from the Auditor of Humboldt County, showing taxes for the years '50, '51 and '52 of \$12,297.16?

A. Yes, and the letter says that that is half of, includes that half-year tax, I believe, that I had already sent a cashier's check for. [576]

(Testimony of A. K. Wilson.)

Q. Yes. In other words, you had sent this cashier's check that was referred to in evidence yesterday, early in June, as a deposit?

A. Is that when it was?

Q. Early in the year 1953, as a deposit on those taxes, had you not?

A. I don't remember just when, but I know we had sent a check for about \$4,000.

Q. The date of the check is July 2, 1953, Coast Redwood check. Is that what you are referring to? (Displaying to witness.)

A. Yes, that's the check.

Q. That is what you were referring to?

A. That is the check mentioned in that.

Q. And you recall also receiving a letter from Mr. Fletcher under date of October, 1953, in which he specifically mentions the taxes of '50, '51 and '52?

A. Yes, sir. Mr. Fletcher was very good about pointing out that we hadn't gotten our taxes reduced as we logged, and he was very good about that. But we were just so busy, we didn't have time to get them.

Q. You also recall, then, receiving a default notice under date of October 19th?

A. Yes, that's right.

Q. For those taxes, '50, '51 and '52?

A. That's right. [577]

Q. And you recall also receiving a telephone call from Mr. Mills that he had been phoned by Mr. Fletcher along about the 29th of December to the effect that those taxes should be paid, the 60

(Testimony of A. K. Wilson.)

days had elapsed and there was a possibility of a termination notice? Do you recall that?

A. Well, I don't know if any of them—if any of them say they called me, I suppose they did. I received so many phone calls, I——

Q. You also recall the wire which states photostatic copies of the receipts had been sent, and showing you Defendant's Z for Identification, that is the receipt that you did send?

A. Well, I suppose.

Q. And that receipt specifically states, "For Taxes for 1950-52," does it not?

A. Well, I never paid any attention to that. I—Where does it say that?

Q. (Indicating). And on the next page, Mr. Wilson.

A. Oh, 1950 there and 1952 and down here it says '50, '51, '52, I guess.

Q. Is there anything in there that shows it to be a receipt for '53-'54 taxes, Mr. Wilson?

Mr. Phelps: The record speaks for itself, your Honor.

The Court: Yes, that is argumentative. I will sustain the objection.

Q. (By Mr. Rank): And do you recall, Mr. Wilson, receiving [578] a default notice covering the '53-'54 taxes sometime in the middle of December, do you not, which default notice is in the record?

A. Well, I don't know whether I received that or

(Testimony of A. K. Wilson.)

not. If it has got my signature on the card, I suppose I did, but I don't—

Mr. Rank: Would you mark this? If the Court please, I think if the Court would permit, we would like to have this be given the same identification number as Defendant's Z.

The Court: You want these documents included in Z?

Mr. Rank: All included in Z.

The Court: All right, include them all in Z. Staple them together.

(Whereupon documents referred to above were joined with Defendant's Exhibit Z as indicated above.)

Q. (By Mr. Rank): Now Mr. Wilson, let's go to the question of your knowledge of whether or not, Union Bond's knowledge, that these logs were not being reported. As I understand it, did you instruct Mr. Owens when he first started getting pink slips for Union logging, did you instruct him, as he testified, that is, to hold them? Do you recall that?

A. Yes, either April or early in May, he asked me what to do with the Pink slips and who to pay the stumpage to on the logs that Union was logging, and I told him I didn't owe any stumpage and just to hold the pink slips until we told him what [579] to do with them.

Q. And when you started logging in Wards'

(Testimony of A. K. Wilson.)

property, did you give him any further instructions on those pink slips?

A. No, never thought about it.

Q. You never thought about it?

A. No, I didn't think about it.

Q. You knew he was just holding those pink slips for Union?

A. Well, I probably knew it, but I never gave it another thought, about the pink slips, at all.

Q. And——

The Court: Well, of course when you started logging operations there, when Union started on its own, you knew then that you had to make payments of what you——

A. No, no, to start with, Union——

Q. No, no. That isn't what I asked you. Not what you started with. The instructions that you gave him were all right when you gave them, but when Union started to log on its own, on the Ward property, then you certainly must have known——

A. Oh, surely.

Q. ——you had to make returns?

A. Sure, when Union——

Q. Why didn't you tell him, then, at that time that you had to send in those pink slips?

A. Well, I thought he knew it. [580]

Q. You say you forgot about it?

A. Well, I never thought about it, I never thought about it. I thought he knew it, and I had forgotten about this other conversation at that time. I'll tell you, I worked seven days a week about 18,

(Testimony of A. K. Wilson.)

20, 22 hours a day, and there are so many things happened and so many people having so many different—so many different places, it always comes down, and why, I can't keep track of everything. I tried to, but I can't.

Q. (By Mr. Rank): And so it was not until early in February that you first suspected, had any suspicion at all, that possibly Owens was not reporting all of the Union logs?

A. As near as I can tell, it was about the middle of February, as near as I can tie it down.

The Court: 1950——

Mr. Rank: Yes. 1954?

A. Yes, 1954. As near as I can tell, it was. The only way I can tell is from other things that were happening; that's about the only way I can tie it down, any date on it.

Q. And so during this entire period of time that you were making the payments, getting the reports, the information was going out, you never suspicioned once——

A. Never suspicioned once, no, sir.

Q. Not even when you would see the amount coming in for the Coast Redwood logs from Coast, you didn't suspect then, [581] have any suspicion then?

A. No, because the amounts we were paying were about the same as we had been paying right long. We were logging on both Coast and Sage land—I mean, on Union and Sage—or on Ward and Sage

(Testimony of A. K. Wilson.)

land, and there was nothing to arouse suspicion on that at all.

Q. Mr. Wilson, you made that statement two or three times. For your information, you paid \$12,000 for logs in June, at which time there were practically no Union logs removed.

A. Well, there would have had to have been a lot of logs removed to pay \$12,000.

Q. None removed by Union?

A. Oh, I see. Well, you see, the reason——

Q. Just let me finish. Just let me go ahead, Mr. Wilson. A. Okay.

Q. The next month, in July, when Union removed a lot of logs, you only paid about \$7,000. Now didn't that create any suspicion in your mind?

A. No, because I was paying for about a hundred days behind all the time, and there was only once or twice or three times in the whole thing, we paid around \$12,000. Our payments were generally about five, six, seven thousand. Something like that. We were paying that right along.

Q. And in September, or rather in August, you paid \$7,000 again and still Union was logging a lot of logs out of there [582] and Coast continued their logging? A. Well——

Q. Just let me finish my question, Mr. Wilson.

A. Excuse me.

Q. Didn't that create any suspicion in your mind when that came to your attention in November? That is when you paid the payment in November?

(Testimony of A. K. Wilson.)

A. What do you mean, came to my attention?

Q. The fact that you were only paying \$7,000 for logs removed in August.

A. Sure, but that wouldn't create any suspicion, because that's what we had been paying for a period of years. That was in line with what we had been paying. That wouldn't create any suspicion at all.

Q. In September you paid about \$5,000, and for October, \$6,500. And then in November you paid \$10,000 and that was the first time you paid for October logs. Didn't that create any suspicion in your mind that something might have been wrong?

A. Well, maybe that's—for Union logs?

Q. For Union logs. I beg your pardon. November was the first month you paid for November logs.

A. We didn't pay for Union logs in November.

Q. Removed in November?

A. We didn't pay for those until in February, wasn't it? [583]

Q. Oh, I know, you paid for them in February, yes.

A. Well, let's keep it clear, then. Not that we paid for them the way that you said. Sounded like we paid for them in November. We didn't.

Q. But at that time you did know that you had not, that the pink slips had not gone out for the June to October logs?

A. In November——

(Testimony of A. K. Wilson.)

Q. When you paid, made the November payment in February?

A. Well, may have. Could have been. No, no, I didn't know at that time. And in fact, I had no idea that anybody could even, anyway figure——

Q. Well, Mr. Wilson——

A. Well, let me finish, now. I have been letting you finish. We were paying about what we thought we owed and we had no idea we weren't paying for all the logs removed from the Ward land. Regardless of who removed them. I never made any distinction in my mind whether they were removed by Coast or Union or who they were. We owed for them and we intended to pay for them, all the time, all at the same time.

Q. When Mr. Owens told you in February that he had not been sending the pink slips to Ward and hadn't sent them for November and December, and you told him to send them for November and December——

A. He didn't say he hadn't been sending them for, as I recall it—If I remember, we only discussed the November, to [584] begin with. I said, "Well, you had better send in the December too, because you have to get delinquent on them also. If you have got them ready, send then in."

Q. Didn't you ask him then about June to October logs?

A. Never asked him about those, never even thought about those.

Q. Never had any suspicion about it?

(Testimony of A. K. Wilson.)

A. Never had any suspicion about it; I have told you that and you know that.

Q. Why do you think he didn't send in the November slips?

A. Because he is many times late, just like you say, there was only thirteen times he was on time in 50 times, only 13 times. Because I knew many times he was late sending them.

Q. During that conversation, did you tell him, as he testified, that French was coming—did you tell him not to show him the Union Bond and Trust records?

A. No, sir, I——

Mr. Phelps: Just a moment.

The Witness (Continuing): I have no——

Mr. Phelps: Just a moment, please. Ther's no objection to the fact, but I do object to that part of it as Owens testifying. Let the record speak for itself, rather than trying to say what the witness testified to, because I think it is an inaccurate statement.

Mr. Rank: Well, let me ask you this. [585]

Q. (By Mr. Rank): Do you recall Mr. 'Owens' testimony of the second day to the effect that you did tell him not to show—or put it this way—to tell Mr. French that the Union Bond and Trust records were in Portland? Do you recall that testimony?

A. Well, they were. I told him to tell Mr. French they were in Portland, he could see them there or we would send them down, or words to that

(Testimony of A. K. Wilson.)

effect. That is what he was going to do. We discussed that, anyway.

Q. What did you tell him?

A. Whether I told him to do that or whether we discussed it, or it was his idea what to do—anyway, there has never been a time that all the records haven't been available to anyone of the Ward people.

Q. What did you tell Mr. Owens to tell Mr. French when he was coming in to examine the Union Bond records?

A. As I said, I don't recall what I told him, but I certainly wouldn't tell him not to show him anything, although part of these records were in Portland. They could either go up there and—or we discussed—Now as to whether I told him to tell him this, or whether this is what he was going to do, or what he told him, I am not sure, now. I am not sure how it worked out. But part of the records were in Portland, and he could either go up there and look at them, which he certainly would have a right to do, or we could have them sent down and he could see them there. [586]

Q. You knew Mr. Owens was keeping the stumpage record that was produced in Court, did you not?

A. I have never seen that stumpage record until it was in Court here, or have never examined it. I have seen shelves of books, but I never had any time to examine those records at all.

Q. Well, you knew Mr. Owens was keeping

(Testimony of A. K. Wilson.)

stumpage records, stumpage book for Coast Redwood?

A. Why, I presume he was. In fact, he would have to, to make the records, to make the reports.

Q. And you knew he was keeping a stumpage book for Union Bond and Trust Company?

A. He should have the same records for Union Bond and Trust Company, as far as production is concerned, as he had for Coast. Not all the same records, because he was keeping all the books for Coast——

Mr. Rank: I suggest, if the Court please, that the witness be instructed to answer the question. The question——

The Witness: Well, you are just trying to foul me up on it.

The Court: Now——

Mr. Phelps: I think he is answering the question, your Honor.

The Court: I think it was responsive. Read the question.

Mr. Rank: Possibly not. Let's go on, rather than take [587] the time to read it back.

The Court: All right.

Q. (By Mr. Rank): I thought my question was, you knew, didn't you, that Owens was keeping a stumpage book for Union Bond and Trust at his Arcata office?

A. Well, I don't know what records he was keeping. He was keeping records for Union Bond and Trust Company and Coast Redwood Company,

(Testimony of A. K. Wilson.)

but he was keeping different records for Coast Redwood than for Union Bond and Trust Company, because he was keeping all the records of Union, of Coast Redwood. That was their principal office, and he kept a general ledger and everything there, and everything. The whole thing was kept there. But the difference in the records was this, for Union Bond and Trust Company. The main offices of Union Bond and Trust Company is in Portland, and the permanent records are kept in Portland. And therefore, a lot of records he was keeping for Coast, he wouldn't keep for Union, because he was sending it to Portland.

The Court: You have explained it sufficiently.

Q. (By Mr. Rank): Did you know that he was keeping such stumpage records at his office, that Mr. French, upon a very brief examination, after having looked at the Coast Redwood books, could determine that there was a discrepancy or a shortage?

A. No, I wouldn't know what records he had to show, because [588] I don't recall ever having seen the Coast records or the Union Bond records. I never had any time to go into those details.

Q. And it is your testimony that nobody connected with Union Bond and Trust, that is, Union Bond and Trust, knew that you were not reporting and not paying for all of these logs being removed during this period of time?

Mr. Phelps: That is objected to, if your Honor please, as assuming someone else's state of mind.

(Testimony of A. K. Wilson.)

He can only talk about his own state of mind, or to his own knowledge.

The Court: Yes.

Mr. Rank: All right.

Q. (By Mr. Rank): When you received the, let's say, the July report that Owens had sent to Ward showing the quantity of logs on it, weren't you at all suspicious, Mr. Wilson, that it didn't contain the Union Bond and Trust logs?

A. Well, I don't think I received that report. That report would be sent to the Portland office. There was months at a time that I am not in Portland.

Q. Well, you knew the quantity of logs being removed by Coast and the quantity of logs being removed by Union each month, did you not?

A. Only in a general way, but I didn't know what land they were being removed from. Sure, I knew there were logs being removed by both companies, but I didn't know from just what land each one of them was being removed from. They was months [589] at a time I wasn't there. I wouldn't know.

Q. When the amount of money that you paid Ward checked with the amount of money you received from Coast each month, didn't that create any suspicion in your mind?

A. Why, I would never seen those records. I wouldn't know anything about that.

Q. You wouldn't know what, how much money was received from Coast?

(Testimony of A. K. Wilson.)

A. No. I was, often time, I would ask Owens, "Well, how much was Coast stumpage this week?" But this was a hundred days later that these things were being paid. My goodness, I couldn't go back and say one hundred—ninety-five or one hundred and five days ago, they was—that week, Coast received so much stumpage, or the next week so much stumpage. Why, I just had nothing like that in mind. It just isn't practical.

Q. When the Portland office received all this information, didn't anybody at the Portland office call your attention to the—— A. But——

Q. Let me finish the question, please.

A. Excuse me.

Q. Didn't the Portland office at any time call your attention to the fact that there was a discrepancy in your payments or reports? [590]

A. No.

Q. Or didn't they call to your attention the fact that you weren't paying for all the logs that were being removed?

A. No, they wouldn't call my attention to whether it was overpaid or underpaid or anything else, because they don't keep the records in that manner up there. In fact, they are way behind with the records up there, and they have nothing to do with the payment on the logs at all.

Q. Does that report go into your bookkeeper, your cashier, how much money you have spent for logs? A. What?

Q. Doesn't that report go into your bookkeeper

(Testimony of A. K. Wilson.)

or your cashier, as to how much money you have spent for logs?

A. Well, it would go in piecemeal, sure, by checks written and checks written from Los Angeles, checks written at Arcata, would be all centered in there. But it certainly is no way that anybody up there would ever know whether we overpaid or underpaid. Probably it would be desirable, maybe, to have such a system, but we have never had that.

Q. Doesn't Portland get a report and information as to how much money is being deposited on behalf of Coast? A. Sure.

Q. Money received from Coast? A. Sure.

Q. Doesn't Portland get a report on how much money is being deposited from the sale of Union Bond logs?

A. Well, sure, they would get a report on that. [591]

Q. And then Portland would get a report on how much money you have been paid for logs removed? A. Sure, they get that.

Q. And with all that information up there, still nobody ever called your attention to the fact that there was a discrepancy between your reports and those payments and the quantity of logs Union Bond & Trust was getting paid for?

A. No, because they didn't even know about it—they wouldn't even know; they wouldn't be interested in that at all. We never got any information at all from Portland regarding stumpage at all.

(Testimony of A. K. Wilson.)

Q. For the month of October, Mr. Wilson, Union Bond & Trust removed and sold almost twice as many logs as Coast Redwood removed?

A. That might be true.

Q. And when you received the reports of Owens as to the amount of logs you were to pay for, knowing that you had logged twice that much by Union, weren't you suspicious at all?

A. I didn't realize we had logged twice as many, because I wouldn't know about that. And then on the other hand, I wouldn't know whether they came from the Ward land or Sage land, and we didn't owe any stumpage on the Sage land anyway. There is nothing there to create any suspicion at all.

Q. All right. Now after you had the conversation with Owens in which he told you that French was coming in to see the [592] records, what was the next time, if any, that you had any information that there might be a discrepancy?

A. Well, I asked Owens a time or two, I asked him, as I recall, if French had been in to see about it, and he said no. And I don't know when it was the next time I had any further discussion or what it was. I know I placed no credence at all on the fact that we could owe any stumpage. I couldn't see how we could owe any stumpage for two reasons. In the first place we were paying approximately what we had been paying; in the second place, Ward had a man every day that knows what was taken out, and if there was anything wrong he certainly would be writing me, because was writing

(Testimony of A. K. Wilson.)

to us for \$19 or \$171 that had not been paid. My goodness, it was certainly a shock to me that we owed any money when I really found out about it, and it was a shock, when you up and find yourself owing some money that you didn't think you owed. You know I didn't know this until February; you know that.

Q. Mr. Wilson, when you received and looked at the report for November which showed only approximately eleven thousand feet of logs, and that report was in the same form as the reports for all the previous months——

A. I didn't get that report.

Q. Did you not testify yesterday under examination that when you saw that report——

A. No, not when I saw the report, because I have never seen it. [593] I never saw those reports, but Owens told me over the phone, when I asked him what he owed, what we owed for November, and I was ready to pay the November stumpage, and he says eleven thousand feet removed, or some such matter, and you owe fifty some dollars. I said, "Why, Paul, that couldn't be right. I don't know how that can be right. We certainly have logged more than that from Wards." I didn't know how much, but certainly we had logged more than that. "You better take a look and see what we do owe."

So he looked again and it was over eleven thousand.

Q. Was that the same time as the telephone conversation that French was coming in?

(Testimony of A. K. Wilson.)

A. It seems to me it was right after this that French was coming in. It was about that time. It is hard for me to tie that in. The only way I could tie it, because I have no record, would be I was getting about ready to pay the stumpage for November. Sometimes I would inquire about that the 10th or 15th or 18th, or about the middle of the month.

Q. When you asked him for the report, what did he tell you?

A. It wasn't why the report was so small; it was when he told me there were only eleven thousand feet. I wasn't interested in reports; I was just interested in how much money was due.

Q. What did he tell you when you asked him about that? Did he tell you that was all Coast Redwood logs? [594]

A. Yes, I believe he did.

Q. Then why didn't you ask him, "Is that all that you have for October? What about the logs Union removed?"

A. I didn't think of that.

Q. You didn't even think of that?

A. No, because we had been paying just what we had been owing as we went along, and I had no inkling we owed anything we hadn't paid for until November, which was the month I was talking about.

Q. What was Owens' report to you as to the conversation he had with Mr. Fletcher over the telephone?

A. Well, I don't recall. I know, as I have told

(Testimony of A. K. Wilson.)

you before—I don't—well, I just don't recall about—I know I didn't put any credence in it because I didn't think we owed any stumpage; that it was a mistake.

The Court: Can't you just answer these questions?

The Witness: Okay.

The Court: And we will get along. I have heard the same thing about a dozen times. You argue the case——

The Witness: Excuse me.

The Court: I have heard it about a dozen times, so I have to say again that lawyers are not correct when they assume that a judge doesn't hear something unless he hears it twelve times. That applies to the witness, too. There is no use arguing about this case as a witness. Can't you ask your [595] questions in a little less argumentative manner?

Mr. Rank: Possibly so.

The Court: It only provokes argument.

Mr. Rank: I think I am provoking argument.

The Court: Ask him some simple question, did he do something, and he talks for an hour about it.

Q. (By Mr. Rank): Do you recall having a conversation with Mr. Owens in which he reported to you that Mr. Fletcher had called about a possible discrepancy in October?

A. Well, it seems like I did; I am not sure whether or not that is the way I heard about this, or whether I heard about a possible discrepancy,

(Testimony of A. K. Wilson.)

but it seems like he did tell me about a conversation with Fletcher.

Q. As I recall from your testimony, your feeling at the time was that if it was a discrepancy, you had no reason to help discover it because you needed time to pay, and also because you had in mind the fact that if they ever discovered it you would have 60 days?

The Court: Mr. Rank, you have asked him a very complicated question and it is getting into argument.

Mr. Rank: All right. Withdraw the question.

The Court: It just opens up a big long speech.

Mr. Rank: I am afraid any question I ask along this line would do so.

The Court: Not necessarily. [596]

Q. (By Mr. Rank): What did you mean, Mr. Wilson, yesterday when you testified that if the Wards discovered this discrepancy you figured you would have 60 days in which to make the payment?

A. I didn't say the words "discovered the discrepancy."

Q. Do you recall your testimony that you would have 60 days in the event there was a shortage?

A. Well, I said if there was a shortage we would have 60 days to correct it.

Q. In other words, it was your thought that if there was a shortage that you would get another notice and would have 60 days to pay?

A. We hadn't had a notice on that yet; not an-

(Testimony of A. K. Wilson.)

other notice. I expected we would get a notice if French and Owens came up with something due, which I didn't think was possible—that we would get a notice in time and have 60 days to pay it.

Q. What months were you talking about?

A. Any discrepancy.

Q. You knew at that time, did you not, that you had only paid up through October?

A. Yes, we paid through October, yes, and we were then ready to pay the November payment.

Q. So any shortage would have been for October or prior thereto, would it not?

A. That's right, yes, because we hadn't paid November yet, so it couldn't be for November, we hadn't paid anything for [597] November.

Q. October and all preceding months had been covered by default notices, is that correct?

Mr. Phelps: That is getting into a legal question.

Mr. Rank: Well, all right; it had been covered by these demands for payment, whatever you call them; that is correct, is it not, Mr. Wilson?

The Court: I don't understand that last question.

Mr. Rank: Well, I will put the question this way:

Q. When you were talking about this extra 60 days you would get you were talking about the month of October or prior thereto?

A. Well, yes, I suppose—I didn't think much about it. I didn't think there would be any short-

(Testimony of A. K. Wilson.)

age. I didn't put out thought on it at all; I didn't think there was any shortage.

Q. What were you talking about—what were you thinking about that is what I am trying to get at.

A. That if there was a shortage—if there was a shortage that we would have—we would get notice and we would have time to correct it. I wasn't concerned; I didn't think there was a shortage in the first place, and if there was, we would have time to correct it.

Q. Was that your thinking during this June to October period, that if you didn't report—

A. No. [598]

Mr. Phelps: Just a moment, Mr. Wilson. I am going to object to that as argumentative.

Mr. Rank: This may be the very thing eventually we have been looking for.

The Court: Suppose you ask the question—

Q. (By Mr. Rank): Was that your thinking in the June to October period, that if you reported incorrectly and then that fact was discovered that you would get another default notice and have an additional 60 days?

Mr. Phelps: This is argumentative.

Mr. Rank: I don't think it is argumentative.

Mr. Phelps: Objected to on that ground.

The Court: All that is going to do is to provoke another speech. He has already answered the question. Now you want him to say that all along in June through October he knew that there was a

(Testimony of A. K. Wilson.)

shortage and his thinking at the time was he wasn't going to bother with it because of the fact that he would get time in which to correct it. He isn't agreeing with you on that and you apparently are not going to get him to change his pattern on that, that he didn't hear about it until afterward.

Mr. Rank: I see.

The Court: I can see that very clearly, but it doesn't help me when you two get in an argument.

Mr. Rank: I am going to start a new subject, if your Honor [599] please. Shall we start now?

The Court: Well, if you gentlemen don't mind—unless you want to come at 1:30——

Mr. Rank: I would just as soon.

The Court: I would like to see this case move along. I know it has moved very slowly. We have spent a lot of time in discussion of it, and I suppose I am partly responsible. I am just trying to get the issue crystallized so I can follow the testimony. So much argument takes up so much time.

Mr. Rank: I appreciate that. It is just as bothersome and troublesome and worrisome to the attorneys.

The Court: I am not criticizing the lawyers in the matter; I am just trying to get the case to move along.

We will take a recess until one-thirty.

(Thereupon a recess was taken to the hour of 1:30 o'clock p.m. this date.) [600]

November 29, 1954, at 1:30 P.M.

A. K. WILSON

a witness called on behalf of the plaintiff, having been previous duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Rank:

Q. Just one or two more questions on a completely different subject. Mr. Wilson, did Mr. Owens report to you the fact that I had a conversation with him in March, 1954?

A. Well, I don't—I don't recall whether he did or not. It seems like he did, but I am just not too sure about it.

Q. It seems as though he may have reported a fact that he had a conversation with me?

A. It seems like he did, I don't recall about that.

Q. Do you recall what he reported to you as having taken place in that conversation?

A. Oh, no, because I wouldn't put any significance on it.

Q. I show you Defendant's Exhibit S, this February 16th letter, and ask you if you didn't instruct Mr. Owens to send that letter?

A. Well, I don't know whether I did or not.

Q. You wouldn't remember then whether you instructed him to send the letter if you instructed him to send it on Coast Redwood stationery? [601]

A. Well, I had instructed him to send lots of

(Testimony of A. K. Wilson.)

letters and do a lot of things; I don't recall instructing him to send that letter.

Q. My question was do you remember instructing him to send it on Coast Redwood Company stationery? A. No, I don't remember that.

Q. Do you have any recollection of whether you did or did not?

A. No, I don't have any recollection of having anything to do about that letter.

Q. As I understand your testimony on the value of the logged-over lands in Township 12, you testified that the merchantable timber in there, down and standing, had a value of \$7 a thousand?

A. Well, from a salvage point of view, yes; I think that on a portable mill or semi-portable mill that it could be salvaged in that neighborhood, yes.

Q. What factors do you take into consideration to arrive at that value? What costs, for example, and what other factors?

A. Well you take into consideration the roads that are in that you would have available so you wouldn't have to build roads.

Q. You wouldn't have the cost of building roads?

A. You wouldn't have the cost of building roads and you wouldn't have much maintenance because the roads are good, hard [602] rock roads, and you wouldn't have the \$14.50 truck haul to the market, and also you wouldn't have to be worried about overloads because you would be hauling on your private roads. So your trucking to your portable mill or semi-portable mill or even permanent mill

(Testimony of A. K. Wilson.)

built on the tract, would be very nominal. It is true you would have—in all fairness, you would have the hauling of lumber to the rail head, which would be about—well, we haven't had any lumber hauled from there, but I think the haul would be about \$6 as against fourteen, it would be \$6, plus the short truck haul, as against \$14.50 for the regular truck haul. That is on the redwood haul. Your truck haul on the fir is \$10, and your truck haul on the lumber would be somewhat less.

Q. How about your cost of operating your portable mill as compared with operating a regular band mill?

A. A mill of that type—your operation would be, in all fairness, your operation would be a little more expensive, both logging and the sawmilling, your operation would be a little more expensive.

Q. Do you feel that your profits on the salvage operation at \$7 would compare somewhat favorably with those profits on the operation on virgin timber at \$15?

A. I would think so. There is a kind of rule of thumb that your stumpage on the logged-over land is worth about half what your stumpage is on your virgin timber. [603]

Q. What you are really doing is appraising, not in so many words, the present value—that is, I am talking about May 12th—of the profits that you might be able to anticipate out of the operation?

A. Yes. And you see the Arcata Redwood Company have such a mill right close to us, just a very

(Testimony of A. K. Wilson.)

few miles away where they are doing just what I was talking about. The Hammond Lumber Company has a big operation to the south and they are spending I heard, a million dollars to build a mill. I know they are building a mill; I heard it would cost about a million dollars to build a salvage mill to do just what we are talking about.

Q. When you are estimating the market value of this stand of timber at six hundred thousand dollars you are estimating at about \$15 per thousand?

A. Yes; it is \$625,000 less real estate commission, which would be about six hundred thousand dollars.

Q. And that figures in your mind about \$15 a thousand?

A. It is approximately \$15,000.

Q. I believe you testified in your deposition that you figured the market value of that timber was \$15 a thousand? A. Yes, that's right.

Q. And that is what you are basing your testimony on?

A. Yes. I would like to clarify the testimony to this extent: that when I talk about the \$15,000 I am talking about a mixed stand of redwood and fir. I do not consider redwood alone is [604] worth that much, because you can make more money with fir than you can with redwood, it is less expensive to log.

Q. For a mixed stand such as this, the profits you will make off of redwood and fir should be

(Testimony of A. K. Wilson.)

somewhat alike and you should have \$15 a thousand?

A. You would make quite a bit less off the redwood than you would off the fir.

Q. Why is that?

A. Because you don't have to peel it, and that saves a dollar or a dollar and a half.

Q. In other words, that is a cost that you save?

A. It costs you less to fall and buck because on a Humboldt scale it is 30 per cent less than fir—than the scale used for fir, so you would save on your falling and bucking cost about 30 per cent more: then your yarding and loading cost is 30 per cent more, and then your hauling cost is reduced about 30 per cent. On the trucking that is why you have \$14.50 a thousand for trucking on the redwood and \$10 on the fir. And our study shows that the fir will bring a higher price per thousand feet Spalding scale than the average—I am talking about the average peeler's and saw mill logs than the redwood will even on the Humboldt scale. So you have a much higher profit in the redwood than in the fir.

Q. Does this follow then that if there were a straight stand of redwood that it would be of a less value than a straight [605] stand of fir of that quality?

A. Well, you mean that if you had——

Q. Let me put it this way, Mr. Wilson: Suppose that instead of forty million feet of redwood and fir it was forty million feet of straight fir of that

(Testimony of A. K. Wilson.)

comparable quality, would the market value be less than \$15 a thousand or more than \$15 a thousand?

A. Well, you would never find it that way, but I think if you could separate that forty one million feet and put the redwood over on this side, where it came on this side, and the fir grew upon that, there would be quite a big difference. In fact, I know there would be a big difference.

Q. The fir would be worth more than the redwood? A. Yes, a lot more.

Q. Because of the lower cost of production you are figuring you could put it in the pond cheaper?

A. Yes, about 30 per cent cheaper, in that particular 14 forties we would get more money out of the fir.

Q. In addition to getting it in the pond cheaper, how about the cost and the profit picture from then on, from the pond through the manufacture and distribution as far as the fir is concerned?

A. Well, you would be getting into a lot of deep water there; it would involve plywood plants as well as saw mills.

Q. Explain for the record, Mr. Wilson, that by delivering it [606] to the pond you mean the same as delivering to the mill?

A. That's right, that's right. But you see we were only interested in selling the logs because we don't have a plywood plant. A number of companies are operating on the saw mill log at this time or mill at this time may either be fir or redwood, and we estimate that we will get, I think it is \$63

(Testimony of A. K. Wilson.)

a thousand average on the fir logs on this tract as against \$60 for the redwood.

Q. And your costs would be lower on the fir?

A. Yes, it would be 30 per cent lower—just about 30 per cent, because the Humboldt scale just arbitrarily increases it by 30 per cent. Of course your water scale will knock off ten per cent on your fir, too, so you would have to take that into consideration. But your fir is lighter to handle and all, so you would probably—that might pretty well equal that.

Q. So that your profit picture would be higher on your fir than it would be on the redwood. And going back to your \$15 figure across the board, you estimate that that is a pretty good average between the two?

A. Yes, I think that is a pretty good average. And the reason I have been so concerned about that is that we have quite a lot of land there where it is redwood only. Your big trouble with that is—the reason we like it a mixed stand of fir and redwood so much better is because when the fir has been took [607] out, then you have got your stumps out there to bust up the redwood and you don't get as much on your roads.

Q. It builds up your per unit cost, your per thousand cost?

A. That's right.

Q. All right, Mr. Wilson. Let's take the valuation of your roads. As I understand, your roads are divided into two general classifications, one your local logging roads that you use to log this area, and

(Testimony of A. K. Wilson.)

the other the two access roads, the Park road to the north, and the Ah Pah to the south?

A. That is not quite right. I can explain it a little better at the map.

Q. Can't you just explain, Mr. Wilson, without—

A. I don't think so. This is the main access road that you are talking about here. I think that is what you have reference to, to that access road that goes down here and comes down here and brings up timber in here also. The same road comes on around here. Those are all main roads—comes around and gets into the timber over in this country. Then this road here will take in some timber there. Then this road—it doesn't show dark, but really should—will run off into this country, and then there is a road here will run off in here, you see.

Q. Let me reframe my question, Mr. Wilson: That roads divide into two classifications: those that are purely local in purpose?

A. Yes, that's right. [608]

Q. And those that might provide access to other timber?

A. That's right.

Q. Those that are just local in purpose are valuable now for logging and handling this remaining merchantable timber in the salvage operation?

A. That's right.

Q. Then if you use the value of those roads in determining the value of your merchantable logs—

A. Yes.

(Testimony of A. K. Wilson.)

Q. You have already used up your valuation, haven't you, Mr. Wilson? Do you see what I mean?

A. Yes, I see what you mean. Now whether that is exactly correct, I would have to give it some thought, whether that is or not. Those roads have a further value than taking the salvage timber, because this land in time will be logged three or four times, see, and then you keep them open for fire protection. So those roads have considerable value even after you have finished your salvage operation; I mean there will still be timber that will come off over those roads maybe five or ten years hence. [609]

Q. But that's correct. But their valuation is primarily for salvage operation of the lands that have already been logged over, and as you say, possibly some fire prevention?

A. Well, not possibly. This is a very important thing, fire protection is very important.

Q. All right. Now you have two main sets, let's put it, of access roads?

A. That's correct, yes.

Q. One feeding into the main Ah Pah access road to the north and another feeding into the Park road to the south?

A. Well, we consider all these dark roads as main roads. However, there are some spurs off from them that would be only these, used for salvage and fire protection, see? But almost all these dark roads reach off into certain timber. You see, this one reaches up here, this one reaches down in here, this one extends in there, this one may extend

(Testimony of A. K. Wilson.)

in there aways. That may go in there, however. This road comes off in here.

The Court: You have gone over this already?

The Witness: Excuse me.

The Court: What's the good of going over it again?

The Witness (Continuing): So almost all the roads are, fall in the classification of being permanent roads.

Q. (By Mr. Rank): And you figure that their value, as I understand your testimony the other day, their value for the [610] purposes that we are discussing here, is as toll roads, is that it?

A. No, not necessarily as toll roads, because we have timber on back there ourselves. We expect to buy more. And also, I don't know whether you would call them toll roads or not, but roads that other people would use and we would get compensation for them.

Q. Well, that is a toll road, isn't it?

A. Well, I don't know. I don't know whether it would be a toll road or not. A toll road is a definite kind of a road.

Q. Well, let's get this straight. The value for one or two purposes would be, either as toll road for somebody else's timber coming across, or for your own timber to come across?

A. Well, yes. And also for salvage and fire protection and for future logging, the third and fourth time, that it will be carried on there. So we have value for a number of reasons.

(Testimony of A. K. Wilson.)

Q. Your road to the south ties into the California Barrel road, does it not?

A. Yes, but it can also come out this way.

Q. Well, I mean, go clear back up north?

A. Yes.

Q. However, to go out to the south and go out the road through the State Park, it ties on to the California Barrel?

A. That's right.

Q. Now, in setting any value on that, have you—withdraw [611] the question.

You are using the California Barrel road now, are you not?

A. That's right.

Q. Are you paying any toll?

A. Yes, 30 cents a thousand.

Q. That is a maintenance charge, is it not?

A. It is a maintenance charge.

Q. But actually, as far as toll is concerned, you are not paying any toll?

A. Well, they call it maintenance charge, but it is part maintenance and part toll.

Q. Have you given any consideration to the reaction of California Barrel or the State Park in the event that you endeavor to make the balance of the road a toll road for yourself?

A. Yes, I have.

Q. And what conclusion have you come to?

A. Well, I have come to this conclusion, that in the first place, for the salvage, why, that plant would be either up here, where we started to level the land, build the plant—up there. Well, that is the most practical place. There are two or three other

(Testimony of A. K. Wilson.)

locations. If that is the case, we don't use any California Barrel road.

Q. That's right. [612]

A. But if we—and everything from here on up, all these roads from here on up come this way anyway, because all this in here, our truckers would always rather go this way to Arcata than they would to go out this way, see, so it would only be this small amount down here that it would be considered in what you are talking about. Well, now, if we wanted to come out from here, and some timber we bought or from somebody else, and wanted to use this half a mile of California Barrel's road, we either have to make some arrangements with them, or else come up around here. We would also have to make arrangements with the Park. However, I don't think the Park would object, because I don't think they care who uses it, if they let us use it at all.

Q. What do you think the reaction would be as to the Forest Service, if you were using the balance of that road, that is, going out the north, now, you are talking about, all this timber going to the north?

A. Yes.

Q. If you made a toll out of the balance of your road, and after taking that into consideration—

Mr. Phelps: If Your Honor please, I hesitate to stop this, but it is speculative, it is assuming a state of mind of someone else, it is hypothetical, incompetent, irrelevant and immaterial.

(Testimony of A. K. Wilson.)

The Court: What does he think the attitude of the Park [613] would be?

Mr. Rank: Well, if the Court please, if a person is going to put valuations on the road—I won't pursue this subject any further.

The Court: Well, I haven't heard anything about valuations of the roads. I have been taking down notes as to what he says is the valuation of the worked over land and the valuation of the so-called virgin land, in value. I suppose he is taking the roads into consideration. But I don't know how you can value the road separately. The testimony shows, I think there is some testimony as to what the cost of it is.

Mr. Rank: You can just be seated, Mr. Wilson. We won't pursue the road question any further.

Q. (By Mr. Rank): Now here is a subject I hesitated to pursue any further, but there are one or two questions I want to ask, and that is on the question of reciprocal rights-of-way. I think I should ask them.

Mr. Wilson, you asked, did you not, California Barrel, or rather, withdraw the question.

California Barrel asked you for a right-of-way across the Ward lands to remove some of their timber that they own or are purchasing from Sage in Section 24, Township 2?

A. No, they never—

Mr. Rank: Just a moment, Mr. Wilson. [614]

The Witness: Excuse me.

Mr. Phelps: I will object to that, if Your

(Testimony of A. K. Wilson.)

Honor please, as incompetent, irrelevant and immaterial; California Barrel isn't involved here. I think we are going down endless alleys.

Mr. Rank: I will explain the purpose of it, if the Court please.

Mr. Phelps: We are going into things that don't relate to this action. Object further on the ground it is incompetent, irrelevant and immaterial, it is not proper cross-examination, no proper foundation. I object to it.

Mr. Rank: I will explain the purpose of it and take whatever ruling the Court wants to make. The testimony has been, of course, the claim that there is a reciprocal right-of-way agreement existing before Wilson got into the property, which gives anybody logging yellow, let's say, the right to cross the green and the green to cross the yellow (indicating chart.) Mr. Wilson, representing the buyers of the yellow and the green, has turned down requests by other owners in the yellow to cross his green. Now—which would indicate that there was not in fact a reciprocal right-of-way agreement, because, had there been, they would have the right-of-way. Now that is the sole purpose, I will take whatever ruling the Court wants to make on it. I don't want to pursue these things any further.

The Court: I see the witness shook his head "no." [615] I think he probably wants to deny that.

The Witness: That's right, I never turned down anybody's rights-of-way.

Q. (By Mr. Rank): Isn't it a fact that Mr.

(Testimony of A. K. Wilson.)

Warren of California Barrel asked permission to cross your property there, Ward property?

A. No, he asked permission to use our roads that were built in there, with an agreement with them to take out their fir also. Now we have no objection to them using, of them building their own roads, rights-of-way, but we weren't going to let them use roads that cost \$20 a mile, that we built, to take out their timber and our timber and just let them go in and use those roads, which is certainly a lot different than rights-of-way. Now after we built the roads in there and tremendous expense, we could log and we have been logging for them for years very successfully.

The Court: All right, you have answered the question.

Mr. Phelps: All right.

Q. (By Mr. Rank): All right. The same question, then, Mr. Wilson, as to Arrow Mill, the same situation existed there, did it not?

A. That's right.

Q. They were also buyers of fir from Sage?

A. That's right.

Q. And they asked you for a right-of-way, or was it a right [616] to use your road, across the Ward lands, Sections 17 and 18?

A. Same thing would apply, that we have no objection to them building roads, but we wasn't going to let them use our expensive roads.

The Court: You were willing to give them a

(Testimony of A. K. Wilson.)

right-of-way, but you didn't want them to use your roads without compensation?

A. If they paid us, and they were logging it so cheap——

The Court: All right, we have the answer.

(Conversation between counsel out of hearing of the Reporter.)

Mr. Rank: If the Court please, we ask to be marked for identification a letter from International Pacific Pulp and Paper Company, or rather, addressed to them, from Union Bond and Trust, and accepted by Ah Pah Redwood, all signed by Mr. Wilson, and I had requested before the hearing today, the original of the letter. Counsel states they couldn't find the original, but there would be no question about the identification of this letter, and I would like to have it marked as Defendant's next in order and I will explain the purpose of it.

The Clerk: Defendant's Exhibit AF marked for Identification.

(Whereupon, document referred to above and identified further hereinafter was marked Defendant's Exhibit AF for Identification only.) [617]

Mr. Rank: It is a letter really amounting to an attempt to exchange rights-of-way between the owners of the Sage "B" property, that is that yellow, and Union Bond and Trust as the owners, and I say "owners"—they are really, then he is in both

(Testimony of A. K. Wilson.)

places, of the Ward properties. Also with language as to the exchange. And the date is September 29, 1947. The purpose of the offer is the same, that if there were, these parties understood there was a mutual right-of-way, there would be no necessity of an agreement of that type.

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial.

The Court: You are offering it in evidence?

Mr. Rank: Well, I am not offering anything in evidence. I asked it be marked for identification.

The Court: Oh, all right.

Mr. Rank: Now, Mr. Mills, there are several documents I have requested of you. Do you have the allocation of the monies received in the Hull sale and also do you have the bank statements of the Los Angeles branch?

Mr. Phelps: We have them, the allocations and bank statements, but we think it is incompetent, irrelevant and immaterial.

The Court: What do you want them for?

Mr. Phelps: And no proper foundation.

Mr. Rank: Yes, I will explain on the allocation of the [618] Hull payment, that I haven't seen it. I have just been trying to get it since our depositions, for that matter.

Mr. Phelps: Well, let's be clear. I mean, I have already said on that that it was a matter that had to be threshed out in court.

Mr. Rank: Well, no, the understanding was that

(Testimony of A. K. Wilson.)

that allocation was to be submitted to me, my understanding of it. But that's neither here nor there.

Mr. Phelps: Well, if for one——

The Court: What do you want it for now?

Mr. Rank: Yes. The purpose of it is this, that in 1951 Union Bond and Trust sold the Ward properties, together with other properties, to Ralph Hull, received at that time a down payment of a million dollars.

The Court: What year?

Mr. Rank: 1951. A certain proportion of that million dollars was allocated to timber. It is our belief and our theory that under the question of the framing of a decree as to restitution of money, that any money received of that type, of that nature, in that fashion by the vendee is money than can be considered as part of the reasonable value of the use, for example, or money that can be considered as a profit having been accruing to the vendee, which the Court should take into consideration as the sole question of amounts there, determination on the matter of the question of punitive [619] damages; that is, damages by way of punishment to the vendee. And therefore it is our intention to show that, and together with certain other monies derived by Union out of this land.

The Court: You say this is a profit that the vendee made?

Mr. Rank: Yes.

The Court: In 1951, by selling part of the timber?

(Testimony of A. K. Wilson.)

Mr. Rank: Out of the selling, yes, the sale of these particular lands.

The Court: Part of them?

Mr. Rank: Well, he actually sold them all in April of 1951 and then took them back in December. But these land were all sold in that sale.

The Court: You mean he received some payment on account and then had to take them back?

Mr. Rank: Yes, the facts were that he received a million dollars down payment, starting in April 14th, around in that date, April or May, and then served a notice of default on August 12th and retook the properties, I believe, early in December of 1951.

Mr. Phelps: It is fair to say it was taken back by agreement.

Mr. Rank: Well——

Mr. Phelps: Well, let's not leave any false impression.

Mr. Rank: Yes, there was logging, there was logging up there by the purchaser, Ralph Hull, by this other man that [620] came in.

The Court: Well, who did he make his payments to, to the Union, or to—directly to Ward?

Mr. Rank: Well, we are not talking about stumpage payments in this, whether he made stumpage payments to Union. We don't know and that isn't part of this case. The theory is that the Union Bond and Trust received "X" number of dollars which came from the sale of these properties, this Ward property we are talking about, and that is

(Testimony of A. K. Wilson.)

part of the money he received out of these properties, and therefore should be taken into consideration and could be taken into consideration in determining whether or not there has been punitive damages.

The Court: Well, that would be a little lawsuit in itself, wouldn't it? How are you going to determine how much of that he actually got, that some of the lumber is taken out and there's that much?

Mr. Rank: No, out of this down payment only, and I asked Mr. Wilson in his deposition if that had been allocated as between timber and plants, and he said it has, and I asked for that allocation. A certain amount of a million dollars to timber and a certain amount of the million dollars to plants. We are just interested in the amount to timber.

The Court: Well, using your own expression, the only value that it might have would be that the vendee received "X-dollars" as you say, on a contract, which reverted to it [621] subsequently.

Mr. Rank: Yes. In other words, he got the money out of the timber and——

The Court: You think that is a consideration that the Court should have before it in connection with the determining the rights of the parties?

Mr. Rank: Oh, I think this—Yes, without carrying this too far.

The Court: Well, is there any dispute about that fact as stated so far by Mr. Rank?

Mr. Phelps: There is no dispute about the fact that the down payment was made. It becomes com-

(Testimony of A. K. Wilson.)

plicated from there on. Breaking it down, it's an accountant's job. I think if you start doing this, it is going to take us two or three days to unravel. I can't see its materiality, because the sale included, of course, the plant down in Compton, it included more than just Union Bond and Trust Company, Coast Redwood Company. It was the sale of their assets, their plant, as I understand it, and to me it has no relevancy on the issue in which counsel is purporting to offer it. I can't see further——

The Court: That is all it really goes to, Mr. Rank, is the question of what, if any, profit the vendee made during the operation of a contract, no matter how he made it, whether he made it by logging operations or by sale, and then reconverted [622] into the property or not, the amount of the profit that the vendee made out of the contract, you think, is a consideration in connection with the determination of this case?

Mr. Rank: Yes, I really do. I really do.

The Court: Well, then, wouldn't you have to know the extent and nature and amount generally of the profits that were made during the whole operation, if any, by the vendee under this contract?

Mr. Rank: It would be helpful, but I am not going to try to go that far.

The Court: Then I don't think it is fair to pick out one isolated item. Maybe he lost some money on some years of the logging operations, and then he made some money on this deal, and then he lost some money or he broke even on something else.

(Testimony of A. K. Wilson.)

Mr. Rank: Isn't that up to them? In other words——

The Court: Well, I don't think—that would be unjust. I mean, I don't think you can open that kind of a Pandora's box and then after you let all the bees out, then the other fellow has to catch them. That doesn't strike me—offhand, I don't see that whether the vendee made or lost money in the operation of this contract is of any great materiality.

Mr. Rank: No, there's another way, I think, that the testimony shows this. I think it is already in. In fact, I am sure it is. That Union Bond and Trust Company sold all [623] of the logs coming off this land to Coast Redwood for \$5.00 a thousand, save and accepting those logs that Union Bond and Trust removed since June of last year. So we have accepted that.

In other words, we are not going to endeavor by any stretch of the imagination to go into the profit or loss of Coast Redwood and A. K. Wilson Lumber Company following those logs through, but insofar as Union Bond and Trust is concerned, it received \$5.00 a thousand, the same as it paid Wards, with the exception of the logs removed by it from June of last year to the date of completion. So it is our intention to have facts on which we can argue that Union Bond and Trust broke even on these \$5.00 logs, it made the profit that we can show on the logs it logged. That's already been testified to by Mr. Wilson in the deposition. And then another

(Testimony of A. K. Wilson.)

item of profit is this allocation of the Hull sale. So it's all very—I mean, it may be that the allocation is too complicated for us to go into, I understood from the deposition that Internal Revenue had made an allocation and it was a simple matter to take that allocation as between timber and plant.

The Court: Well, because you developed it in the deposition doesn't mean necessarily it is admissible in evidence.

Mr. Rank: No, I appreciate that. I am talking about the [624] difficulty——

The Court: I don't see that it has any materiality at all whether the vendee made a profit or not. What has that got to do with it? He is either in default or he isn't in default.

Mr. Rank: Remember, if the Court please, we are the defendant's in this action. They are the plaintiffs. They are the defaulting vendees and they are the plaintiffs. They have asked to quiet title, to their interest, and they are the ones upon whose shoulders rests the burden of proof in this matter. It is their burden to plead and prove first of all facts as to the type of default, whether it was wilfull or not.

The Court: Well, they just anticipated you when they brought the suit. We have that situation constantly in the patent litigation——

Mr. Rank: That's all right.

The Court: ——that the alleged infringer brings a declaratory action——

Mr. Rank: Be that as it may.

(Testimony of A. K. Wilson.)

The Court: —to meet the infringement suit. But the same issue has to be determined. It doesn't make much difference.

Mr. Rank: Be that as it may, they are the plaintiffs. Now the question, if—and I have said this a half-dozen [625] times, Your Honor—if it becomes a matter of finding that it is a wilfull default, then a decree of restitution of payments, of some type, has to be made. In order for the Court to frame that decree, it must have facts to frame it, so it is not, does not result in punitive damages to the vendees under the rules, damages by way of punishment. Now it is certainly a matter that the Court should take into consideration, that which the vendee has received off the property while he has been operating it. Now we are not attempting to show everything he has got, but it is our plan to show that certainly as to the logs that were taken out since June 1st of last year, the per thousand profit, and it is very simple, Mr. Wilson testified to it in his deposition and we are going to offer that. This other matter, it may be too complicated by way of proof to offer, but as far as the theory of it being admissible is concerned, under that problem of law, I don't think there is any question. And as I say, I understood from the testimony in the deposition that it was merely a matter of a record, one page, or one sheet like that, timber so much and plant so much. That that would be a simple matter to offer. I find now we have a stack of computations, which of course we are not going into. But the

(Testimony of A. K. Wilson.)

question will arise on my very next questioning of the witness, and that is as to the profit per thousand on logs that he made, the Union Bond and Trust made on the [626] June——

The Court: Well, I have no objection to the fact going in, if it can be done simply, and then we can determine, if you think there is some relevancy of that to the issue, determining that question later. But I don't know about this.

Mr. Rank: Let the question of the Hull allocation rest until I have had a chance to examine the documents, certainly not during Court hours here.

The Court: Gentlemen, I am not going to let this case drag along for further investigations in the matter. The issue, it seems to me, is a simple one, I mean comparatively simple. No case is simple. It is just a question of whether or not the nature of the default that occurred here—that's really all there is to it. Now there may be some more complications as to matters that may be taken into account in molding the decree, depending upon the finding as to the nature of the default, but that may have some materiality. I am not sure of that now.

Mr. Phelps: Well, its materiality, as I——

The Court: Well, there is no question that it is agreed that a million dollars was received?

Mr. Phelps: There is no question about that.

The Court: There was a down payment of a million dollars, they opened up this Hull contract for a while, and then eventually, because of circum-

(Testimony of A. K. Wilson.)

stances which we don't need to [627] inquire into, the property was taken back, is that right?

Mr. Phelps: By agreement, by agreement and——

The Court: So far there is no dispute about that.

Mr. Phelps: That's right.

The Court: Now the remaining question is, how much of that million dollars was a profit, is that right?

Mr. Phelps: Yes, but then you get into the question——

The Court: No, no, I am just asking, that is the question, is it?

Mr. Rank: That's it.

Mrs. Phelps: That is his——

The Court: Well, I say that, there is a—you can't agree as to how much of that million dollars was a profit.

Mr. Phelps: That's right.

Mr. Rank: How much of the million dollars was allocated to stumpage, that is the point, yes.

The Court: Well, how much was the profit on the stumpage, then? [629]

Mr. Mills: What Mr. Rank wants to know is how much of the million dollars is allocated toward properties. That contract which covered all the Sage lands, all the Ward lands, the two plants and a half million dollars worth of equipment.

Mr. Phelps: Yes, that's the point. How you can find your way all through that, and then, if Your Honor please——

(Testimony of A. K. Wilson.)

Mr. Rank: May I suggest something that might solve this right now, if you will excuse me?

Mr. Phelps: All right, I didn't want to be cut off.

Mr. Rank: Well, I mean, rather than argue the point, I have a suggestion that maybe we can go along with the Court on. Would the Court simply bear in mind that particular matter and if it comes, if it becomes material to the Court in framing a decree, it can request that that matter be gone into.

Mr. Phelps: That's satisfactory.

Q. (By Mr. Rank): Now on the question of the logging profit, to make it very short, Mr. Wilson, you testified in your deposition that your profit on both fir and redwood logs by Union, while Union Bond was operating, was from \$20 to \$25, is that about the correct amount?

Mr. Phelps: I am going to object to that as incompetent, irrelevant and immaterial, if it is for the purpose of showing as counsel has just announced, in the purpose of the last question, because of course it would be just but one item. It doesn't follow through. If it is for the purpose he has just [630] announced for the last question, then that brings in again the question of our going further and showing the losses which there have been. If your purpose is just to show, if you have some limited purpose in mind, that doesn't go to that issue, that you have just announced on so-called cumulative damage theory, I would consider withdrawing the objection.

(Testimony of A. K. Wilson.)

But insofar as—if your purpose is general, including what you just offered as a purpose for the last question, then I will object.

Mr. Rank: I don't think——

The Court: I don't know what that means.

Mr. Rank: I don't follow that.

Mr. Phelps: Well, I don't see what profit has to do with this. As I see this, Your Honor, I have stood by and said nothing about counsel's repeated interpretation of these cases, and I have always been at the point where to say something would have prolonged the matter further. But I don't agree with counsel's statement as to the unjust enrichment.

As I see it here, under these cases, the unjust enrichment would come to the vendor, who would be taking back property that is worth more when he agreed to sell it at the original price.

The Court: I understand.

Mr. Phelps: That is my conception of it.

Mr. Rank: I think you are wrong in that. But I am not [631] going to argue it.

Mr. Phelps: Well, neither of us is going to argue it. But I don't see it that way, and——

The Court: Well, there can't be any—as I see this contract, and I have tried some oil cases that involved similar situations, there can't be any unjust enrichment to a vendee under a contract. It is impossible, because he has contracted to pay a certain amount of money upon the theory that he is going to make some money on it, and he can't enrich

(Testimony of A. K. Wilson.)

himself in any way as long as he has performed the contract. That is, he can't unjustly enrich himself. The only time the doctrine of unjust enrichment comes into effect is if there is a forfeiture.

Mr. Phelps: That's right.

The Court: I don't see that's applicable otherwise. I don't see that that has anything to do with it. But I don't know whether that is Mr. Rank's point or not. That is what you said.

Mr. Phelps: Well, I assume that is his point. If he will tell me of another purpose, I will be glad to entertain the suggestion. But I can't think of any other point.

The Court: What does he mean by—what did you say, \$25?

Mr. Rank: \$20 to \$25.

The Court: A thousand? [632]

Mr. Rank: A thousand profit on the sale of logs.

The Court: Do you mean gross profit on these particular logs that came from the Ward property?

Mr. Rank: Well, it is net profit on these particular logs that came from the Ward property. That's the question.

Mr. Phelps: But again, not bound—then you have to follow this——

The Court: Let him answer the question and get it in the record, whether that is so or not, and then we will argue the rest of it out at some later time. At the moment, I don't see it makes any difference how much profit the vendee makes.

(Testimony of A. K. Wilson.)

Mr. Rank: Well, possibly not, but I think it may become material.

Q. Mr. Wilson, is that a fact, that your testimony was that you made a minimum of \$20 a thousand profit on all the logs removed from the Ward properties after stumpage? In other words, that was after stumpage and all other costs?

A. Well, as I recall, you asked me some question——

The Court: Read him the question and answer. I don't want to listen to all these speeches any more. We have got to get this case along. Twenty minutes on this one question here, one fact. Can't you get something specific to ask him?

Mr. Rank: Yes, I thought I did ask him that.

The Court: Well, then, if you are talking about something in the deposition, then read him the question and the [633] answer and ask him if he said that.

Q. (By Mr. Rank): The question in your deposition is as follows:

“What was your direct profit on a thousand feet of fir logs and a thousand feet of redwood logs?

“Answer: Our direct profit on a thousand feet of fir logs?

“Question: Your average.

“Answer (Continuing): Would be, I believe, \$20, \$25, over and above the stumpage we paid.”

The Court: Now, did you give that testimony?

Mr. Phelps: And it is understood my objection goes to this line.

(Testimony of A. K. Wilson.)

The Court: Yes, subject to the objection as to materiality.

The Witness: That was just a horseback statement. I didn't have any figures to quote him. I said, I believed that is about what it was.

The Court: That is what you said in the deposition?

The Witness: Yes.

Q. (By Mr. Rank): And you said the same as to redwood, is that correct?

A. Yes, I said our profits would probably be about, would be about that much.

Q. Yes.

A. I believe. But I have no fact to back that up.

Q. Now, on thing further, Mr. Wilson. Do you recall now the [634] approximate date that you first heard about the information being given to Mr. Harvey out of which he planned and prepared those reports?

A. What reports do you refer to?

Q. Well, the information given to Harvey up in the woods, when did you first hear about it?

Mr. Phelps: What do you mean by that? What information?

Mr. Rank: When did he first know about the information that was being given to Mr. Harvey by the scaler in the woods.

A. Well, Mr. Harvey has been getting information up there for years.

Q. (By Mr. Rank): Mr. Wilson, when is the first time you knew about it, heard about it?

(Testimony of A. K. Wilson.)

A. Oh, I knew about him getting information, some kind of information right along, but what I think you are probably referring to is this weekly report?

Q. Yes.

A. That he was given, which I learned about that, oh, I think this last spring or summer some time, when I first learned he had been getting that for a year or so. But that particular report, I knew he had been getting information all the time, whatever information he wanted he was getting.

Q. I am referring solely to this particular report, and to refresh your memory, would you say it was some time between May 12th and June 1st, or at least after May 12th; that is the sole [635] purpose of the question.

A. Well, I don't know. I don't recall now, because he has been getting reports all along, and we were glad to give him any information he wanted.

Q. May I call your attention to your deposition, Mr. Wilson—I don't want to labor this point, Mr. Wilson, but——

Mr. Phelps: You show me the part and I will stipulate.

Mr. Rank: Page 223.

Mr. Phelps: Show me where it is.

Mr. Rank (Indicating): Here. I asked him about it down there.

Mr. Phelps: You read it and we will stipulate that the question was asked and the answer given.

Mr. Rank (Reading):

(Testimony of A. K. Wilson.)

“Question: About when did Monier tell you of this information being given to Harvey with reference to May 12th, let us say, approximately?”

“Answer: Well——

“Question: As nearly as you can remember.

“Answer: Well, I think it was after May 12th or about that time. Now that’s about what I think.

“Question: My recollection is that on June 1st in Los Angeles he testified it was a week before that that Monier had told you.

“Answer: Well, I don’t know. [636]

“Question: Approximately that time.

“Answer: I don’t know.

“Question: Do you have a transcript of the testimony, Mr. Rank? I have got part of it. This is off-the-record.

“Answer: Well, that is getting closer. I said one time it was a week before June 1st and now it is not too far away from May 12th, but that is getting close.”

Mr. Phelps: Stipulate those questions were asked and those answers given. There were some others on the same subject but I will have to find them, I guess.

Mr. Rank: That is all. [637]

Redirect Examination

By Mr. Phelps:

Q. Now, Mr. Wilson, first of all, sir, with respect to certain tenders which were made after May 12th, 1954, will you state whether or not you tendered payment for the logs which had been removed after

(Testimony of A. K. Wilson.)

November and December of 1953 through and including the date of the termination of the contract?

Mr. Rank: Just a minute.

Mr. Phelps: Why don't we——

Mr. Rank: I think that has already been covered by a stipulation.

Mr. Phelps: What we don't have are the documents, and I have them here, Mr. Rank, including the letters of transmittal. We will put them in as one exhibit.

Mr. Rank: You don't have our replies?

Mr. Phelps: Yes, I think the replies in every instance are there.

Mr. Rank: We can check that anyway.

Mr. Phelps: I will offer in evidence as Plaintiff's exhibit next in order a series of letters with photostatic copies of checks and letters of reply commencing May 19, 1954, and extending through August 4, 1954, as plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit No. 18 introduced and filed into evidence. [638]

(Thereupon, letters, checks and replies identified above were received in evidence and marked Plaintiff's Exhibit No. 18.)

Mr. Phelps: Now, may I state this, if Your Honor please: One of the checks that appears as part of this exhibit now is a check for \$5,950 dated July 23, 1954, and, Mr. Rank, you will recall that on the pre-trial conference I had stated to you and had stipulated as a fact that that had not been tendered. I was in error. I find that it had been ten-

(Testimony of A. K. Wilson.)

dered, so that all the payments had been tendered, and there is your letter returning the original check to us. May we correct that fact, sir?

Mr. Rank: Yes, whatever is the fact.

Do you have the bank statements that I requested?

Mr. Phelps: Yes.

Mr. Rank: May we examine them at some time?

Mr. Phelps: Yes.

One other thing, Your Honor: That last check has never been cancelled and voided; I don't know whether it should——

Mr. Rank: We won't take it.

Mr. Phelps: I don't know whether the Clerk——

The Court: If it once gets in the Clerk's hands, it will take an act of Congress to get it out.

Mr. Phelps: I think that is a fair statement, if Your Honor please. All right. [639]

The Court: This correspondence, so that I won't have to go into it in detail, is the correspondence tendering payments in the period from May to August, 1954?

Mr. Phelps: That is correct.

The Court: Were all of these checks that were tendered not accepted?

Mr. Phelps: They were not accepted and returned.

The Court: They were returned with the letters returning them?

Mr. Phelps: The letters returning them are all included in the same exhibit.

(Testimony of A. K. Wilson.)

The Court: What is the total of the checks?

Mr. Phelps: Those checks total—the first one is \$1,281.87. The next check is \$18,989.05. The next check is \$9,102.82, and the final check is \$5,950.

Mr. Rank: And they were delivered and covered logs removed during what months?

The Court: I was just going to ask that question.

Mr. Phelps: All right. It appears that the first check for \$1,281.87——

The Court: From what period to what period?

Mr. Phelps: The first one is for a balance claimed to be due for logs removed during the month of December.

The Court: Balance of December?

Mr. Phelps: That is right. The next is for \$18,989.05 [640] for January and February, 1954; the \$9,102.82 is for logs removed during the month of March, 1954; and the final one, \$5,950, is for April, 1954.

Mr. Rank: Mr. Phelps, in order to complete this record—is that the last check?

Mr. Phelps: Yes.

Mr. Rank: In order to complete this record, would you stipulate, No. 1, that there has been no tender made for the balance due for logs removed during June to October, 1953? That is now admitted.

Mr. Phelps: There has been no tender?

Mr. Rank: Yes, by check.

Mr. Phelps: By check? I will stipulate that there has been no tender made because there has

(Testimony of A. K. Wilson.)

been no demand for performance under the terms of the contract, and we have come to a legal matter that we can take up later.

Mr. Rank: Yes.

The Court: This is a total of about \$35,000, and there is also an equal amount covering the months from June to October?

Mr. Rank: That is correct.

The Court: That brings it up to \$70,000?

Mr. Rank: That is correct.

One thing further: And that is a stipulation that there were no reports covering those periods, those months that are [641] included in the exhibit just offered; in other words, that we have received no reports from Union Bond & Trust Company giving us the quantities of logs removed?

Mr. Phelps: Will you give me an opportunity to check that?

Mr. Rank: Yes. That is the fact.

Mr. Phelps: I will check that, and if it is true certainly we will stipulate with you, but I don't know at the moment.

Mr. Rank, do you have the return of the attachment of the Marshal on the attachment in this action? I want to prove that.

Mr. Rank: I think it is in the original file. We have no return.

Mr. Phelps: May I ask for the original file, then, if Your Honor please?

The Court: Here it is.

(Testimony of A. K. Wilson.)

Mr. Phelps: I don't turn quickly to it, but we can search for it during the recess.

The Court: What is it you want to find out?

Mr. Phelps: I want to point out the amount of cash that has been attached by writ of attachment out of this Court; the exact figure it is, some twenty-one thousand dollars——

The Court: Didn't you make an agreement as to that at pre-trial?

Mr. Phelps: We did; we agreed that it would be pursuant [642] to the return.

Mr. Rank: Neither of us had the exact amount.

Mr. Phelps: We neither of us had the exact amount. We agreed it would be in accordance with the return.

The Court: How much was it, approximately?

Mr. Phelps: \$21,000, approximately. In fact, our stipulation said it was approximately \$21,000, subject to correction by the return of the Marshal.

Q. The next thing, Mr. Wilson, I show you——

Mr. Rank: We will stipulate that you received it from the Belcher Abstract & Title Company and we won't question the identification of it.

The Court: What does it say? Tell me what it is.

Mr. Phelps: These, if Your Honor please, are two title reports covering two parcels of land owned by the Union Bond & Trust Company in fee and not subject to this litigation or any other litigation, and the title report from the Belcher Abstract & Title Company shows there was a writ of attachment issued in the amount of \$79,394.70 in favor

(Testimony of A. K. Wilson.)

of Harold L. Ward, et al., against Union Bond & Trust Company, dated May 28th, 1954, recorded June 3, 1954, in Book 294 of official records, page 624, issued out of the United States District Court, Northern Division. That is this case.

The Court: Where are these lands?

Mr. Phelps: Those lands are lands up in this area along [643] the river (indicating).

The Court: Title of which is in the Union Bond & Trust Company?

Mr. Phelps: Union Bond & Trust Company.

The Court: And not connected with the Wards?

Mr. Phelps: Not connected with the Wards.

The Court: At the time this attachment was levied?

Mr. Phelps: This attachment was also levied——

Mr. Rank: The report so states.

The Court: Actually, what did you do? File a lis pendens?

Mr. Rank: We filed a lis pendens, but we didn't issue a writ of attachment. Our instructions in the attachment were intended to attach the Union Bond interest in the Sage "B" lands, that is all we intended, and that is all we instructed the Sheriff or Marshal to attach.

The Court: Have you got the records of the attachment?

Mr. Rank: No, Your Honor, but we do have our instructions to the Marshal.

The Court: Why don't you get the Marshal to bring in his return and we will find out what it is.

(Testimony of A. K. Wilson.)

Mr. Phelps: Let's do that.

The Court: Don't bother with title company reports.

Mr. Cook: I object to it on the ground that is hearsay, if Your Honor please.

Mr. Phelps: The additional thing I wanted to point out [644] for Your Honor's consideration——

The Court: Can't you save time?

Mr. Rank: Do you have the Marshal's return?

The Court: Can't you stipulate that there was some lien that the plaintiff asked to put upon this property or some property of the Union at the time this suit was filed? And will that cover the purpose?

Mr. Phelps: Yes. The purpose is to show, if Your Honor please, that our efforts to raise money off this particular land have been hindered by this writ of attachment, and I am going to show now how many million feet of timber there is on that land and that its value is worth more than \$164,000 that is due.

Mr. Rank: Oh, oh.

Mr. Phelps: I am about to show that, if Your Honor please, and I also wanted to offer the Belcher Abstract & Title Company report and ask that it be marked for identification.

The Court: I see what your point is—for commercial purposes, you want to show how the title has been affected?

Mr. Phelps: Yes, if Your Honor please, for commercial purposes in order to raise this money and also——

(Testimony of A. K. Wilson.)

The Court: When was that attachment put on?

Mr. Phelps: That attachment was levied——

Mr. Rank: After the default, after the notice of termination and the filing of the action. [645]

Mr. Phelps: That is right. I think May 28th is when you levied it.

Mr. Rank: I think so.

Mr. Phelps: 1954, but we will check that for the record.

The Court: Wouldn't it be immaterial?

Mr. Rank: That is right. [645-A]

Mr. Phelps: I think not, if Your Honor please, because—and this is my sole purpose with respect to that, if Your Honor please—that the free assets—that the free assets which were owned by Union Bond and Trust Company and known to be owned by Union Bond and Trust Company that could be used to raise this money to pay this off, all at that time—this is after the notice of termination—were in encumbered by this writ of attachment, and it will be a matter here that we will argue to Your Honor that the filing of writ of attachment is not proper where there is a security transactions, and this is a security transaction. They had their security. And in spite of that, they tied up \$21,000 cash that was vitally necessary and tied up property with 17 million feet of free timber on it. Some of that is subject to a deed of trust, but I wanted to show that.

I also wanted to show by the same Belcher Abstract and Title Company that both of these pieces

(Testimony of A. K. Wilson.)

of property have further exception of rights-of-way over and across the property set forth in reciprocal right-of-way agreement to Ward Redwood Company and Blue Creek Redwood Company and property owned by the Sage Land and Lumber Company, Ward Redwood Company and Blue Creek Redwood Company, as well as rights-of-way to permit access owned by Sage Land and Lumber Company, being the same rights-of-way reserved by Sage Land and Lumber Company and indicated in the agreement with Union [646] Bond and Trust Company on January 11, 1949.

Mr. Rank: I think what we had better do is to get the Belcher Abstract and Title Company in here. In the first place I have the instructions to the Marshal, and I attached to the instructions the description taken from the Sage "B" contract which could only possibly tie up those descriptions.

Now there is something about this title company up there, they get a little free and easy, they have done that with you and they have done that with us. There is no attachment, because I appended descriptions, two or three pages of them, from the Sage "B" contract to the Marshal with the instructions. If Belcher in their examination of the records up there——

The Court: That is all right.

Mr. Cook: It is hearsay anyway, Your Honor. They are not admissible for any purpose.

The Court: I think so too.

Mr. Phelps: Let us have them marked for identification.

(Testimony of A. K. Wilson.)

The Court: All right. Mark them for identification.

The Court: Plaintiff's Exhibit No. 19 marked for Identification.

(Whereupon, documents referred to were marked Plaintiff's Exhibit No. 19 for Identification only.)

Mr. Phelps: Over the next recess we will check the return. [647]

Q. (By Mr. Phelps): With respect to both those lands, Mr. Wilson—showing counsel the cruises——

Mr. Rank: Which land is this?

Mr. Phelps: Those are the cruises covering the land just described in those two title reports.

Mr. Rank: If you state that those are photostatic copies of the cruises I will accept your statement.

The Court: Mark them for identification.

Mr. Rank: Mark them for identification, because they are not admissible as yet in the present state of the record.

Mr. Phelps: Yes. May then these cruises be marked for identification?

The Clerk: Plaintiff's Exhibit No. 20 marked for identification.

(Whereupon, documents referred to above were marked Plaintiff's Exhibit No. 20 for Identification only.)

(Testimony of A. K. Wilson.)

Mr. Phelps: With the understanding that they are not yet in evidence, but stipulated that they are the cruises of the lands involved and described in the two title reports just marked for identification.

Mr. Rank: Wait a minute. Well, subject to checking.

Mr. Phelps: Oh, yes, any correction that may appear.

Mr. Rank: That is right. [648]

Mr. Phelps: That you call our attention to, it is subject to such a correction.

Q. (By Mr. Phelps): Now, Mr. Wilson, with these cruises in mind, we don't care to go through them piece by piece—have you from those cruises computed the total amount of timber on the lands described by the descriptions in the two title reports? A. Yes, sir.

Q. What is the figure, sir?

A. 17,605,000 feet.

Q. Do you have an opinion, sir, as to the market value as of May 19, 1954, of the land covered by those cruises?

Mr. Rank: To which we will object as being immaterial at this time and also improper redirect, although I don't like to be technical about that.

The Court: I am not sure as to the materiality of this testimony generally.

Mr. Phelps: May it be admitted subject to Your Honor's ruling?

The Court: I am in doubt as to whether the ability of the vendee to make the payments at the

(Testimony of A. K. Wilson.)

time concerns us particularly; but if it does appear that it does, then we have some facts.

Mr. Rank: I understand this all relates to a period of time commencing after the notice of termination. [649]

The Court: That is right.

Mr. Phelps: Yes, and the purpose at the moment is to show, if your Honor please, the harassment that was undertaken on the part of the defendant which prevented and really prevented the raising of funds.

The Court: Well, that would happen in any case where A owes B some money and B goes after him for it. That might hurt the credit of B, but that's fact.

Mr. Phelps: Yes, but if Your Honor please, where you have security, as this was secured, then you don't give out a writ of attachment.

The Court: That might be another sort of a claim; in other words, you might have a cause of action for wrongful attachment, I don't know. That is a different matter.

Mr. Phelps: For what it is worth at the moment and subject to Your Honor's—

The Court: I will allow the witness to answer the question subject to a motion to strike as to its materiality.

Mr. Phelps: Thank you, Your Honor.

Q. (By Mr. Phelps): Do you have the question in mind? A. No. What is it?

The Court: He wants to know what the value of that seventeen million feet of timber is.

(Testimony of A. K. Wilson.)

The Witness: Approximately a quarter of a million dollars. It is worth about \$15 a thousand; it is redwood, fir and also [650] a little white cedar. It is worth about \$15 a thousand, whatever that will multiply; about a quarter of a million.

Q. (By Mr. Phelps): Will you state to the Court whether any part of that land was subject to a deed of trust, and if so, securing what amount?

A. A portion of it, in fact about 80 per cent of it was subject to deeds of trust, but those deeds of trust were just for additional collateral, so in reality——

The Court: Additional collateral for what?

The Witness: For a mortgage on a sawmill. One was a \$125,000 deed of trust on a sawmill that cost over \$800,000 to build, and these people that loaned the money, they didn't know what the sawmill——

The Court: They put that as an additional security for a larger sum, is that right?

The Witness: That's right, and the second——

The Court: That is enough.

Mr. Phelps: He wants to tell you about the second deed of trust.

The Witness: The second deed of trust shows a hundred thousand dollars, but that was additional collateral for some accounts receivable that is all paid off, but three or four thousand dollars of being paid off, so that really isn't against it. [651]

(Recess.)

Mr. Phelps: May I proceed, Your Honor?

Q. (By Mr. Phelps): Mr. Wilson, I show you a series of cruises and ask you if you can identify

(Testimony of A. K. Wilson.)

those as the Percy French cruises covering the Ward lands under this contract of May, 1946?

The Court: Cruises made in 1946?

Mr. Phelps: In—they were made—Here's the date here. No, they were made, these are the Percy French cruises which were supplied to him, as he has testified, by Colonel Ed Fletcher, prior to his buying the property in 1947. They were made, I believe——

The Witness: In 1929.

Mr. Phelps: In 1929.

The Court: What do you want to show?

Mr. Phelps: I want to show the cruise, what the cruise shows. I just offer these in evidence, won't refer to them except later.

The Court: Well, I don't want to have to look at them unless they serve some purpose.

Mr. Phelps: Well, they show the timber stand, both the virgin and the other, what it was.

Mr. Rank: Why don't we stipulate as to the amounts shown, the amount? I think we already have in the record what they showed on Township 12, and we will stipulate what they show on Township 11, as net mill cut. [652]

Mr. Phelps: Well, we can agree on that. The only thing is, Mr. Rank, that I also want to show the quality as referred to——

The Court: Have you any objection to this going in?

Mr. Rank: No, no, no objection.

The Court: Mark it in evidence and then you can call attention to what you want to.

No. 14996

**United States
Court of Appeals**
for the Ninth Circuit

HAROLD L. WARD, et al.,

Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record
In Three Volumes

Volume III
(Pages 709 to 1004)

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FILED

APR 19 1956

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**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

(Testimony of A. K. Wilson.)

The Clerk: Plaintiff's Exhibit No. 21 introduced and filed into evidence.

(Whereupon, timber cruise referred to above was received in evidence and marked Plaintiff's Exhibit No. 21.)

Mr. Phelps: What I am doing, if Your Honor please, is, I adopted Your Honor's suggestion of going through all these files, and I am now picking up those that complete the picture, if I may.

The Court: I didn't make that suggestion. I don't know where you got that. I didn't ask you to do that.

Mr. Phelps: What I meant was that I took the time——

The Court: You don't have to put all these documents in unless there is some purpose to it. It just makes a bigger record.

Mr. Phelps: I have a definite purpose, but what I meant, if Your Honor please, was, over the recess I did check the records to see what was in and what wasn't. [653]

The Court: All right.

Mr. Phelps: Now, Mr. Rank, you asked for, on the pre-trial conference, the checks from June to October. I have them here. I don't know that they are helpful to either of us, because they are checks made out directly to the bank. They show the amounts and they show that they were drawn on the Union Bond and Trust Company, but they only

(Testimony of A. K. Wilson.)

show for purchase of cashier's checks. If you want them, there they are.

Mr. Rank: I don't think I asked for these, did I?

Mr. Phelps: Yes, on pre-trial.

Mr. Rank: For June to October checks?

Mr. Phelps: Yes. That is my understanding. But at any rate, they are here. Perhaps they can just be marked for identification.

The Clerk: Plaintiff's Exhibit No. 22 marked for identification.

(Whereupon, checks referred to above were marked Plaintiff's Exhibit No. 22 for Identification only.)

Mr. Rank: I asked for the—well——

The Court: What checks are they?

Mr. Phelps: These are the checks covering the stumpage payments from June to October, inclusive, of 1953.

The Court: That's the ones that were paid? [654]

Mr. Phelps: Yes.

Mr. Rank: I assume that what you mean, Mr. Phelps—are these offered in evidence or just for identification?

Mr. Phelps: They are just for identification. You can offer them if you wish; it does not matter.

And next I want to offer, which hasn't been done before, to complete the record, are just these two de-

(Testimony of A. K. Wilson.)

fault matters which—I checked the record and they are not in evidence.

Mr. Rank: This is the November and December?

Mr. Phelps: Offer in evidence as Defendant's Exhibit, as one exhibit, two letters. First, a letter dated December 22, 1953, and the next a letter, January 21, 1954, being so-called notices of default from Harold L. Ward, addressed to A. K. Wilson, Union Bond and Trust Company. That's Plaintiff's Exhibit No.——?

The Clerk: Plaintiff's Exhibit No. 23. In evidence, Counsel?

Mr. Phelps: Yes.

The Clerk: Introduced and filed into evidence.

(Whereupon, two letters referred to and identified above were received in evidence and marked Plaintiff's Exhibit No. 23.)

Mr. Phelps: And out of your file (handing document to counsel).

Mr. Rank: Yes. Do you have—— [655]

(Conversation between counsel out of hearing of the Reporter.)

Mr. Phelps: Next I want to offer in evidence a photostatic copy of a telegram to Harold L. Ward dated April 25, 1954, signed A. K. Wilson, which is self-explanatory, and ask that it go into evidence.

The Court: What is it?

The Clerk: Plaintiff's Exhibit No. 24 introduced and filed into evidence.

(Testimony of A. K. Wilson.)

The Court: Let me see it.

(Whereupon, telegram referred to above was received in evidence and marked Plaintiff's Exhibit No. 24.)

Mr. Rank: Is our April 15th letter in, to which that is a reply?

Mr. Phelps: Yes, yes, that's the reason.

Mr. Rank: I was going to put that whole thing in.

Mr. Phelps: I am doing it. What I am doing is just picking up the loose ends of those letters, where they refer to a letter and it is not in evidence. I have undertaken to do that.

And then——

(Conversation between counsel out of the hearing of the Reporter.)

Mr. Phelps: Two letters of October 6th, 1953, and a reply [656] thereto of October 12, 1953, first addressed by Paul A. Owens to Harold L. Ward, and Mr. Ward's reply with respect to the February and March shortages, and offer that in evidence as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit No. 25 introduced and filed into evidence.

(Whereupon, letters referred to above were received in evidence and marked Plaintiff's Exhibit No. 25.)

(Testimony of A. K. Wilson.)

Mr. Phelps: Next I want to offer in evidence three letters as one exhibit, may it please the Court:

A letter of August 31, '53, from the Secretary to Mr. Ward to Mr. Wilson; second letter is dated November 13, 1953, from Mr. Ward to Mr. Wilson; and the third letter is addressed to Hardin, Fletcher, Cook & Hayes, dated March 1, 1954, signed Union Bond and Trust Company by A. K. Wilson, and I ask that these three letters be introduced into evidence as Exhibit next in order.

The Clerk: Plaintiff's Exhibit No. 26 introduced and filed into evidence.

(Whereupon three letters referred to above were received in evidence and marked Plaintiff's Exhibit No. 26.)

Mr. Phelps: And finally, if Your Honor please, I have no other questions except on one subject, which I should like [657] reserved for the time being, for this reason, that it has entirely to do, Mr. Rank, with the question of damages sustained as a result of the attempted cancellation and shutdown, and my thought in not going into it with Mr. Wilson at this moment, is that I thought that I could possibly shorten it, because I have some witnesses that will be here after Court this evening, and those facts that I can develop from those witnesses I won't have to duplicate with Mr. Wilson, and I can shorten it, possibly, down to three or four or five

(Testimony of A. K. Wilson.)

minutes, if I do it that way, and I would like to reserve that.

Mr. Rank: We have no objection.

Mr. Phelps: And I do have an expert that I want to call before the evening is over, so——

The Court: Well, you have covered a lot of ground there, now. Are you through with this witness?

Mr. Phelps: Except for that one subject.

The Court: What one subject?

Mr. Phelps: Do you want to cross-examine on any of these subjects? The subject of the question of possible damages as the result of the shutdown up there, Your Honor.

The Court: Actual damages to whom?

Mr. Phelps: To Union Bond and Trust Company.

The Court: For the period during which the barricades were put up?

Mr. Phelps: Yes, if Your Honor please. [658]

The Court: How long a period is involved?

Mr. Phelps: About a week.

Mr. Rank: Two or three days.

Mr. Phelps: My thought is completely this, if Your Honor please. I thought I could shorten it. I don't want to ask Mr. Wilson questions I find I have witnesses that can cover. I am just not going to duplicate it. That was my thought.

The Court: Aren't the witnesses here?

Mr. Phelps: They are not here at this moment, and I thought I would interview them after Court

(Testimony of A. K. Wilson.)

and then we can shorten them. I have a witness I want to call at this time on the subject of—

The Court: Then you really have nothing further to ask this witness unless you recall him for something?

Mr. Phelps: That's right.

The Court: All right, that's all.

Mr. Rank: I have one question to ask on recross-examination.

Recross-Examination

By Mr. Rank:

Q. Mr. Wilson, your testimony as to the value of the property under attachment, that extra property, fifteen—just to shorten this, Mr. Wilson, is that \$15 valuation based on the same ideas, the same consideration of factors that you [659] testified that the timber in Township 11 was worth five fifteen, approximately?

A. Yes, and also on the basis of prospective purchasers we have that are willing to buy the timber. They were negotiating sales for, and had negotiated sales for—

Q. All right, two combined, let's say.

A. Well, yes.

Mr. Rank: Now, Mr. Phelps, one matter I forgot to cover. We can cover it in our stipulation, if you will. That is, that Mr. Wilson in his deposition testified—you want to step up here?

Mr. Phelps: Certainly.

Mr. Rank: That from January 1st of this year up until the time of the deposition that the resale

(Testimony of A. K. Wilson.)

price that he was receiving for redwood logs was \$54 a thousand, and for fir logs, as \$52.50, a thousand; pages 206 and 207.

Mr. Phelps: So stipulated, subject to my objection as to its materiality.

Mr. Rank: Yes.

Mr. Phelps: Which has already been outlined.

Mr. Rank: That's all.

Mr. Phelps: May I introduce just one other thing.

Further Redirect Examination

By Mr. Phelps:

Q. With respect to the question of offers, what offers are you referring to that counsel asked you about? [660]

Mr. Rank: To which we will object on the ground it is immaterial and hearsay.

Mr. Phelps: You opened it up as to the basis of his knowledge.

Mr. Rank: Oh, no; oh, no.

The Court: Well, I think so. There is no end to this thing. I will allow it.

Q. (By Mr. Phelps): First with respect to the fourteen forties.

Mr. Rank: Well, now, I understand his testimony now was, I asked him about this extra piece at \$15 and he said it was based upon——

The Court: This is all subject to the objection as to its materiality. You are talking now about the property that was attached.

(Testimony of A. K. Wilson.)

Mr. Phelps: Well, I will refer to the property that was attached.

Q. (By Mr. Phelps): Have you had any offers on that?

A. Yes, that that you referred to.

Mr. Rank: To which we will object as being immaterial on the question of valuation and hearsay also.

The Court: I will sustain the objection. The witness had already testified as to the value of it.

Mr. Phelps: All right, Your Honor. I won't press it, then. [661]

The Court: And unless somebody contradicts it, that's the way it stands in the record.

Mr. Phelps: All right, Mr. Wilson, will you step down?

(Witness excused.)

Mr. Phelps: Mr. Cobb, will you take the stand, please, sir?

W. L. COBB

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court, Sir?

The Witness: W. L. Cobb.

The Clerk: C-o-b-b?

The Witness: Yes, sir.

(Testimony of W. L. Cobb.)

Direct Examination

By Mr. Phelps:

Q. Where do you live, sir?

A. Santa Rosa, California.

Q. And what is your business or occupation?

A. I am a timber cruiser.

Q. And how long have you been engaged in the work of timber cruising?

A. Commercially, since 1942.

Q. And where do you have your office? [662]

A. In the Montgomery Building in Santa Rosa.

Q. All right. Now, will you tell us, please, sir, what training and experience you have had in the timber work before becoming a commercial timber cruiser in 1942?

A. Well, my father dealt in timber from 1908 until 1932, and I worked with him and for him since high school days, and I learned to cruise when in high school. I fell and bucked logs and helped to operate a sawmill. I think I have done every act of logging, and estimating, buying and selling up to '38.

In '42 I entered partners with Jim Holmes of Portland, who is an old time cruiser, and I was partners with him for two years. And in 1944, '44, '45 and '46, I was County cruiser for Douglas County in Oregon. We helped set up about 150,000 acres of County-owned land and set it up for sustained yield units for different sawmills.

(Testimony of W. L. Cobb.)

In '46 the plywood companies began coming into Roseburg and I became affiliated with one of them, principally, the Umpqua Plywood Corporation. I still maintained an office privately, though I did all of their cruising that they bought, about three million dollars worth of timber, on my work. In '49 the Umpqua Plywood sold and established a mill at Crescent City, which is a peeler plant. Then going to Medford. I think that I probably cruised as much timber for buyers as I have sellers. Of course the County, Douglas County, was [663] primarily a seller.

My work in California in redwood, particularly, started, I believe, in 1950. It might have been '49. My first large job that a mill was built on was the Hamilton Brothers setup in Crescent City. I cruised half a section——

Q. Just a moment, Mr. Cobb. Did you say Hamilton Brothers? A. Hamilton Brothers.

Q. Don't go quite so fast; Mr. Rank is taking notes. A. All right.

Q. Will you continue, please?

A. Later, I believe it was in '50 or '51, I cruised the Blue Creek property, at least I cruised about four sections, three or four sections on it, on Blue Creek.

Q. Where is that? A. In this——

Q. In this area?

A. That's in twelve three, I believe, twelve three and thirteen three.

Q. For whom did you do that?

(Testimony of W. L. Cobb.)

A. For Ralph Hull.

Q. All right.

A. And I cruised the Bull property on Bear Creek for Pacific Veneer. I believe that was the following year. Or I guess it was the previous year.

Q. Is the Bear Creek in that general area? [664]

A. It is now known as the Bull property.

Q. The Bull property? A. Yes, sir.

Q. And is that in the Del Norte-Humboldt general area?

A. That's in twelve three, I believe it is, in Weitchpec.

Q. You say twelve three?

A. Twelve three.

Q. What—I mean, you will have to identify that for the record. Is that in Del Norte?

A. It is in Humboldt County, yes.

Q. Humboldt County?

A. It's near this particular tract, the Ward tract, which is in twelve two. I worked in ten two last year, in fir for Pacific Veneer, and I was back again this year about a month ago in the same general area for an estate here in San Francisco. In between these main ones I have given, are numerous smaller owners that I can't recall at this time. [665]

In '50 I came down to Sonoma County for Lee Evans and Paul B. Kelly at the time they bought the south portion of the Wheeler Land Company. At the same time I maintained an office in Crescent County. I did quite a bit of work for the Hewitt City as well as in Roseburg and in Del Norte

(Testimony of W. L. Cobb.)

Land Company and Henry, Barber and Markham at Tacoma, who were timber investors. That was particularly on the Burnett tract.

And about that same time I also looked at the Hobbs Wall tract and the Gravecourt tract, the timber on Goose Creek from Red Mountain to the mouth of the Smith River.

Q. (By Mr. Phelps): All right. Now have you also had experience in cruising burned areas and cruising logged-over areas for salvage jobs?

A. On that Kelly tract in Sonoma County about eight thousand—about 800 acres of that was burned this year and I recruited that, for the Polla Trading Company which owns the timber that is now being cut by the American Redwood Company, as fast as loggers finished logging each party and representative areas, I have been checking each party following certain loggers for downed timber, left standing timber and broken logs and splits with an idea for salvage. I do the same thing for this Hewitt Land Company in Oregon. On some of their lands they have sold the timber as many as three times, and now on one particular tract it is being logged the fourth time.

Q. All right. Incidentally, have you cruised some land which [666] was owned by the Sage Land & Lumber Company in Humboldt County, some fir?

A. Yes, sir, it was in Section 9 of 12/2, for fir only.

Q. That is on that map, then?

A. Yes, sir.

(Testimony of W. L. Cobb.)

Q. All right. Now are you familiar, sir, with what is known in the trade as salvage operations?

A. Yes, sir.

Q. And will you explain to the Court what the salvage operation is? How would it work?

A. A salvage operation is—in fact, any logging is a salvage operation, but the term generally meant is a re-log after a first or second logging operation. It consists to a great extent in logs and trees that were not merchantable at the time of the first operation. That would take split logs, short chunks, short logs that could be bucked from broken pieces, leaner trees, then when market conditions get so it takes an inferior tree than at the first operation——

Q. Now, at my request, sir, did you make a cruise of the logged-over lands in the Ward-Wilson Tract in Sections 17, 18, 19, 29, 31 and 32?

A. Yes, sir.

Q. And when did you do that?

A. I ended on the 20th of November.

Q. By “ended” you mean what? [667]

A. Completed.

Q. You finished your work on the land?

A. I completed field work, yes, sir.

Q. When did you commence the field work?

A. The previous Tuesday.

Q. Who did you have working with you? Did you have any assistants working with you?

A. I had a compassman named Charles Fiscus of Annapolis.

(Testimony of W. L. Cobb.)

The Court: You are talking about this November that we are in now?

Mr. Phelps: Yes, this November, '54.

A. And with me was Silas Carr, resident forester of the Polla Trading Company and Gullala Redwood Company of Gullala.

Q. And just what kind of a cruise was it that you made on this logged-over land?

A. On one forty we made a 20 per cent cruise. We took a strip 66 feet wide on that forty, which was one mile long, and we went down the center of each two and one-half acres. And on the balance of the forties we took strips 66 feet wide twice through the forty, for a 10 per cent cruise.

Q. Will you tell the Court what you were cruising, what you were looking for, and what you determined, without saying amounts, for the moment? What was the purpose of it?

A. The purpose was to get what standing timber there was left that would be merchantable, and the logs and the chunks. [668] We took the logs down to 10-inch diameter and 10 feet in length for milling purposes, and 30 inches in diameter to six feet in length for split products, pickets, posts, shakes, and so on.

Q. All right. Now the area that you cruised was this logged-over land—about how many acres did it consist of? We have heard it referred to——

A. As I recall it, about 1,900 acres—1,960 acres.

Q. If you want to use your report to refresh your recollection, you can, at any time you wish to,

(Testimony of W. L. Cobb.)

sir. A. You mean the particular forties?

Q. No, no, just the number of acres. 1,961——

A. I believe 1,961 or thereabouts.

Q. Point four zero acres; is that about right?

A. Yes, sir.

Q. Now as a result of the figures that you developed on the areas that you did check, were you able—again without giving figures yet for the moment, were you able to extend them over to the adjoining areas that you did not check so as to give an average over the entire 1,960 acres?

A. Yes, we first cruised——

The Court: You don't have to go into all this detail. If the other side wants to cross-examine, they may. Ask him the final question, whatever point you want to get at.

Mr. Phelps: Very well, your Honor. [669]

The Court: What is it you wanted to show—the quality and quantity of lumber remaining on this area, or what was it? Ask him that question.

Q. (By Mr. Phelps): On a salvage basis, sir, as of the present time, will you tell us, please, the quantity of standing redwood, standing fir, redwood logs, for milling, redwood chunks for split products, and fir logs?

A. Yes, sir, on the volume per acre extending to the corresponding areas cruised 13,935,172 board feet standing redwood; 2,894,282 board feet of standing Douglas fir; in redwood logs 14,700,996 board feet; in redwood chunks 1,613,015; fir logs 3,915,456.

Q. What does that total?

(Testimony of W. L. Cobb.)

A. It totals 37,058,941 board feet. The redwood is in Humboldt scale both in standing timber and logs, and the fir is in Spalding.

Q. All right. Now Mr. Cobb——

The Court: That is 37 million odd feet of merchantable timber left on the salvage operation?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Phelps): Now, Mr. Cobb, on such a salvage operation, can you tell us from your experience whether it would be necessary to build new roads for the operation or whether the existing roads could be used? [670]

A. The existing roads could be used. However, it would be a different type of logging and milling operation than any that has been——

Q. What would it be?

A. It would be primarily a small mill that would be portable or semi-portable. The equipment would be light and fast. There are several types. One is the bandsaw mill and the other is the Scragg type mill. But the whole business would be predicated on a light, fast operation.

Q. All right. Now, then, from your examination of that logged-over area or 1,961 odd acres, do you have an opinion and conclusion, sir, based on your experience in the industry, as to whether or not the original logging operation was a good, clean operation?

Mr. Rank: We will object to that as being im-

(Testimony of W. L. Cobb.)

material, and hearsay as far as this witness is concerned.

Mr. Phelps: From his observation as he saw it, I am asking; not anything that he received from anybody else.

The Court: Is any question going to be raised about that?

Mr. Phelps: Well, if counsel isn't going to raise that question and will so stipulate——

Mr. Rank: No, I won't stipulate to anything like that.

Mr. Phelps: That is the trouble, your Honor. I want to meet it in case it is raised. If you are not going to raise it and you are objecting to the question on the ground that it [671] is immaterial, I won't press it other than to have the record show that I attempted to elicit the information; and if you want to object and will so advise and the Court rules against me, that is all I can do on that.

Mr. Rank: I will withdraw the objection, Mr. Phelps. I don't want to stop you.

Mr. Phelps: Well, is there an issue on that?

Mr. Rank: There may be, Mr. Phelps.

Mr. Phelps: Well, then, I think he should be permitted to answer. I don't know just what it is, but I am anticipating, your Honor.

The Court: Well, it is evident we are trying everything that the parties had to do with one another.

Mr. Phelps: I don't mean to do that.

The Court: Counsel are attempting to do that.

(Testimony of W. L. Cobb.)

Mr. Phelps: I don't mean to do that.

The Court: I am not going to pay attention to all of that because I am here in that capacity.

Mr. Phelps: I am perfectly willing to withdraw it if it isn't in issue.

The Court: Well, what is your answer to that? Was it a good operation?

The Witness: That was a clean operation, yes, sir.

Mr. Phelps: You may cross-examine. [672]

Cross-Examination

By Mr. Rank:

Q. Mr. Cobb, is it your opinion, or would your opinion be changed at all as to whether or not it was a good operation if you knew that on a French cruise there was 120 million feet originally of redwood and logging operations only produced 43 million feet of merchantable redwood? Would that make any difference in your opinion? A. No, sir.

Q. Did you know there was a fire through there?

A. Yes, sir.

Q. Did you take that into consideration?

A. Yes, sir, I took that into consideration.

Q. And is it your opinion that a logging operation which produces something like 30 per cent of a cruise is a good operation?

A. Well, it is good for a particular period.

Q. What particular period?

A. Depending on the logging prices, the market

(Testimony of W. L. Cobb.)

for logs, and it is—the whole thing is that a logging operation is based on that.

Q. A good logging operation takes all merchantable logs, does it?

A. As of a certain date.

Q. As of the date of the logging?

A. Yes, sir. [673]

Q. Say this logging was conducted over the last five-year period, and on a French cruise it produced only 30 per cent of redwood, would you call that good logging?

A. Within the last two years there has been about——

Q. Within five years.

A. There has developed in the last two years, there has been quite a change in markets and the development of mills and equipment to handle re-logs.

Q. Just what do you mean by that? I don't want to labor this question, but I am surprised at your answer.

A. With one company that I have worked for, they logged—they have sold the timber on a piece of land three times and now there is a fourth operation. Each logger when he finished it thought that he had done a good job of logging, and he had done for that particular area at that time. Now they are——

The Court: I don't see how you could tell any-how——

Mr. Rank: That is the point.

(Testimony of W. L. Cobb.)

The Court: —whether the operation was a good one or not. How can you tell?

The Witness: You can by the residue.

The Court: That wouldn't necessarily prove it, would it?

A. I think so.

Q. Well, wouldn't how the operation itself was conducted at [674] the time that it was conducted have something to do with it?

A. Well, it would if——

Q. All you can see there now is what trees were cut down and what are left. How does that lead you to conclude whether it was a good operation or a bad one?

A. By comparing them with other operations that I have been on.

Q. In what way? You mean as to the proportion of trees that are left standing?

A. Partly.

Q. The manner in which they were removed, how much of the stump is left, and so forth?

A. Yes, sir, and how much was broken, the amount of split logs that are on the ground that were not taken the first time across.

Q. (By Mr. Rank): How can you tell, Mr. Cobb, how much was broken to the point where it was completely wasted?

A. Well, that part of the log is still on the ground.

The Court: Well, gentlemen, I don't see the competency of this. Mr. Ward took Mr. Johnson

(Testimony of W. L. Cobb.)

for better or worse when he signed this contract. I don't think it makes a bit of difference whether he did a hundred per cent workmanlike operation or only a 75 per cent workmanlike operation as long as he turned in everything, unless he has got a suit for damages against him for a breach of some term of the contract [675] that I don't know anything about.

Mr. Rank: No; the materiality of it was, as far as we are concerned, all the time was that the only source that we had to look to for the payment of the full price was the logs removed and the necessity of removing sufficient logs from the whole area to pay the total purchase price, because they could log over the whole area and then just dump it back as a completely depleted land.

The Court: You haven't got that situation here?

Mr. Rank: No, we don't have.

The Court: You have some land that wasn't touched yet, and you have some land that still may be worth something. So you haven't got that situation. You wouldn't be able to determine whether there was a cause of action for breach of this contract unless you were able to show that the logging operations wouldn't produce the amount which the vendee agreed to pay.

Mr. Rank: I just want to ask one more question on this line.

Q. Mr. Cobb, you show a total of 27 million feet of merchantable redwood left, and there was 43 million taken off; that is a total——

(Testimony of W. L. Cobb.)

The Court: He said 37 million.

Mr. Rank: 37 including the fir. That is a total of 70 million feet of merchantable out of 120 million originally, with [676] apparently 50 million gone some place. How can you explain that and still say it was a good logging operation?

A. You say there are——

Q. Through a hundred.

A. 30 million feet of redwood left standing in logs, yes, sir.

Q. 30 million? Oh, yes, 30 million. I made a mistake. So that would be 63 or 76 million or about 44 million that's then—disappeared. I mean, we don't know where it is, and apparrenty it isn't on the ground, so would you still say that is a good logging operation?

A. Well, I don't know. I can't compare this with a cruise, because I don't know what the cruise was, only what was told me.

Q. Well, those are the facts from the record that were just introduced.

The Court: Well, all you have told him is somebody said there was that much lumber there, and you want him to say, he has got to assume that is true.

Mr. Rank: Yes. Well, that is the record.

Q. That was the Percy French cruise, Mr. Cobb?

A. I still think it is a good operation.

Q. Well, all right. Just one or two questions. You say you checked, you selected certain areas that you

(Testimony of W. L. Cobb.)

checked and then you used that to average the entire area for a quantity cruise?

A. Yes, sir. [677]

Q. And—— A. Corresponding areas?

Q. Yes. And who selected those areas?

A. I did.

Q. You selected those areas, and then you made, in four days you made a cruise which you are using as a basis of your report here for almost two thousand acres, is that it? And the area that you did cruise, would you call that what, a two-run cruise?

A. No, I made one four-run cruise and the balance were two-run cruises.

Q. Then in your opinion, Mr. Cobb, is that a sufficient cruise for which you could recommend to a buyer or seller for an area of that size?

A. I think so, because I compared the remaining areas. I went into certain areas that looked about uniform and I cruised particular parties in those certain areas and for those areas I used as a basis the volume I found on those forties.

Q. Did you use the same rules for merchantability that you used for cruising virgin timber?

A. Well, not necessarily, because your lumber, a lot of it is short. You use the same basis for whether the log is a good log or not, whether it is sound. You see, there's a different market for smaller, for shorter lumber than in a salvage, in a re-log, than in straight logging, straight mill. [678]

Q. What rules did you make, are there any established rules you followed, like the Forestry Service or anything like that?

(Testimony of W. L. Cobb.)

A. Well, I used—of course the primary thing was whether or not the log was sound, and if it was full of knots or what.

Q. Well, you made up your own rules, Mr. Cobb; that is what I am getting at, didn't you?

A. No, sir.

Q. What rules did you use? I don't want to drag this out, but what rules did you use to establish merchantability?

A. The redwood log grade scale of the Forest Service, that the Forest Service has set up.

Q. And you used that all the way through on all of the logs on all of the standing timber?

A. Yes, sir.

Q. That isn't what you testified to a minute ago, is it, Mr. Cobb? You testified a moment ago that you used a different grading rule for salvage than you do for cruising merchantability timber.

A. Well——

Q. I mean, virgin timber.

A. Well, in—of course the grading rules for standing timber, redwood, based upon a 20-foot log, and a lot of these are shorter than 20-feet, so we took them down to 10. But as far as surface, shear logs, we took just clean logs, that would make good lumber. [679]

Q. Did you, incidentally, allow for the State requirement for seed trees and standing trees?

A. Yes, sir.

Q. You allowed for that?

A. Yes, sir, everything under 24 inches.

(Testimony of W. L. Cobb.)

Q. Your report showed that? A. Yes, sir.

Mr. Rank: That's all.

The Court: Counsel, if I had known on pre-trial that this question of value was going to be followed up, I would have required counsel to state, subject to the materiality of the evidence, their respective claims as to that, because we may be wasting, there has been a lot of time spent on this question of value and you may or may not be far apart. I don't know—on value. You have said that it's worth at least \$160,000. Now the other side has got evidence in that it is worth a great deal more than that. But subject to materiality, this is a matter that probably should have been covered at pre-trial conference, and I don't know how to rule on this. It may be that when the time comes, there is going to be testimony on your part that there——

Mr. Rank: Our testimony will be short, sweet and to the point, I hope, your Honor.

The Court: Well, what is your claim, how much attention is the Court required to give to this? You don't gain any [680] advantage by surprising me with it at some particular stage in the trial of the case; is there a big difference or isn't there?

Mr. Rank: We probably will not attempt to offer any evidence on the value of the logged-over land, because in our opinion, you just can't set a value. Most of that is logged on a recovery basis, and there just is no market value for it. On the others, there's considerable difference. Our value will run 50 per cent of theirs. And salvage opera-

tions in redwood is something that, although it's—some of it going on now, isn't anything that has been very common in the industry.

The Court: Well now, Mr. Rank——

Mr. Rank: Yes?

The Court: There's \$160,000 due on this contract, plus interest, and maybe something additional that might be involved in an order of that kind, if the vendee were able to perform, and do you think that—so you are going into all this litigation over what in your opinion might be not more than a hundred thousand dollars or so, in that neighborhood, of value?

In other words, your client would not take \$160,000 plus interest and maybe some damages or something with reference to——

Mr. Rank: If the Court please, I don't think it is fair [681] of the Court to——

The Court: With reference to settling this contract?

Mr. Rank: I don't think it is fair for the Court to point its finger at me and say, "Your client won't do this."

The Court: Well, it works both ways. I just elected you as my first victim, that's all.

Mr. Rank: Well, maybe I am better looking than Mr. Phelps.

The Court: Well, that is something——

Mr. Rank: Well, of course I meant that jokingly. I meant nothing by that remark.

The Court: Are both sides through with this witness?

(Testimony of W. L. Cobb.)

Mr. Rank: Yes, your Honor.

Mr. Phelps: Yes, your Honor.

The Court: Are you having anybody else today?

Mr. Phelps: Yes, I do, your Honor.

The Court: Let's run on a little while anyhow.

Mr. Phelps: I can go on with Mr. Carr; and I can do this——

Mr. Rank: Will he testify to the same thing?

Mr. Phelps: I was going to say, I can quickly qualify him and, or——

Mr. Rank: Is he a valuation man or a cruise man?

Mr. Phelps: No, he made the same cruise along with him and if we can stipulate that he would testify to the same thing—he made the same [682] cruise.

The Court: You say he made the same cruise?

Mr. Phelps: Yes, but he assisted him and if he wants to accept that stipulation, we can shorten it. I had intended to call him, but I am perfectly willing to shorten it.

Mr. Rank: Sure, we will stipulate he would testify the same.

The Court: All right, what's the witness' name?

Mr. Phelps: Will you state your name for the record, please.

The Court: Better have him sworn.

Mr. Phelps: If you will.

SILAS B. CARR

was called as a witness on behalf of the plaintiff here, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the court, sir.

A. Silas B. Carr.

Q. C-a-r-r? A. Yes, sir.

Direct Examination

By Mr. Phelps:

Q. May I very quickly do this, Mr. Carr. Will you very quickly tell us, just highlighting it, your qualifications? [683]

Mr. Rank: We will stipulate he is qualified and we will stipulate he will testify the same as the other gentleman.

The Court: All right, it is stipulated, is it, that the witness is qualified to testify as a log cruiser, as a timber cruiser, and that if he were questioned, he would give substantially the same testimony as given by the previous witness, Mr. Cobb?

Mr. Rank: Yes.

Mr. Phelps: Qualifications go to cruising logged-over land, which is involved?

The Court: Well, he stipulated to that.

Mr. Phelps: All right. Then I shan't ask this witness any other questions.

The Court: All right, you can be on your way.

(Witness excused.)

Mr. Phelps: May I suggest, if your Honor please, that——

The Court: What have you got left?

Mr. Phelps: I should not be—I want to see these witnesses tonight and my purpose in seeing them is to try to just have no duplication, and I don't think I will be over an hour and a half.

The Court: Well, so you——

Mr. Rank: We will be ready to go.

The Court: All right. Now I am pointing my finger at you again, but that doesn't mean I am putting you on the spot. [684]

Mr. Rank: I understand, your Honor.

The Court: I was just trying to ascertain what really is the core of the controversy, I mean, what it amounts to, evaluating it in some way or another. That's all. And you don't have to answer if you don't want to.

Recess until tomorrow morning at 10 o'clock.

(Whereupon an adjournment was taken until tomorrow morning, at 10:00 o'clock a.m., Tuesday, November 30, 1954.) [685]

November 30, 1954—10:00 A.M.

The Clerk: Union Bond and Trust Company versus Blue Creek Redwood Company, further trial.

Mr. Rank: Ready, your Honor.

Mr. Phelps: That is ready, your Honor.

The Court: Do you have a witness ready?

Mr. Phelps: I do, your Honor. I have a number

of witnesses. I am going to try to get them all on and not duplicate anything with respect to any of them. We should be through with them, I anticipate, within an hour or an hour and a half.

Mr. Lane, will you take the stand, please?

ERNEST E. LANE

was called as a witness on behalf of the Plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows

The Clerk: Will you please state your name to the Court?

The Witness: Ernest Earl Lane.

Direct Examination

By Mr. Phelps:

Q. Mr. Lane, your address please, sir?

A. Orick, California. Is that the one, the address?

Q. Your address? Where do you live? [687]

A. I live in Portland—Portland, Oregon.

Q. And when you are engaged in the business of logging in and around the Arcata-Eureka area, you have a residence there too, I take it?

A. Yes, sir.

Q. Now what is your business or occupation, sir?

A. Logger.

Q. How long have you been engaged in that business?

A. Since 1916.

Q. Now, Mr. Lane, calling your attention to the

(Testimony of Ernest E. Lane.)

period of time of May, '54, this year, where were you logging at that time, sir?

A. I was working, logging for the Union Bond and Trust.

Q. All right. Whereabouts? On what land, do you recall? A. Sage. Sage land.

Q. And I am sure you haven't seen this map, but would that be the Sage land that is—can you just locate the general area where you were?

A. Pardon me, sir; I am sorry—

The Court: Well, is it necessary? He was logging on the Sage Land.

Mr. Phelps: All right, your Honor. I thought it was because of something it is preliminary to.

The Court: It has been pointed out on the map so many times I don't think it is necessary. [688]

Mr. Phelps: It is just the particular road that he had to come out.

Q. (By Mr. Phelps): Just tell the Court then without pointing it out—

A. I was logging on the 230 road.

Q. And with respect to the logs that you were logging at that time, over what road did those logs have to come out?

A. Well, it was a road that they called the Park road.

Q. Is that the south set of these roads? I am trying to quickly establish, Mr. Lane, the set of roads. There is a series of roads in the north which we have termed, Mr. Rank and I, the access roads; and then there is a series of roads in the south

(Testimony of Ernest E. Lane.)

which we have termed Park road. Did those logs come out over Park road?

A. Yes, they came out Park road.

Q. In order to do that, did they go over the Ward land? In order to do that, did it come out over the Ward lands?

A. Yes, it came out over the Ward lands.

Q. At that time, in May, 1954, will you state whether or not you were doing any logging on the Ward lands?

A. No, sir.

Q. In May of 1954, sir, what was the first information you received that there was a possibility that you might have to shut down your operations? How did you happen to come to learn it? What happened? [689]

A. Well, sir, I went down to the office; a couple of men wanted to draw, and I went down to the office to draw, to get the money, and met Mr. Rank at the office in Arcata.

Q. All right. Prior to that occasion, when you met Mr. Rank, had you been advised, had you noticed any signs that had been placed or any activity with respect to barricades?

A. I just don't remember on that part.

Q. All right. Now when—can you place the time for us when you talked to Mr. Rank, and where was it?

A. Well, I couldn't remember the dates, but it was along towards evening. It was in Paul Owens' office there in Arcata, California, I met Mr. Rank.

Q. Can you place it for the Court whether it

(Testimony of Ernest E. Lane.)

was prior or after the barricades had been set up, if you can?

A. I don't believe—I believe it was before the barricades were set up.

Q. All right. Just calling your attention—because there has been other evidence, Mr. Rank, those barricades—I believe we have the dates now—were set up on the 19th, I believe Wednesday, the 19th; that is the date that they were locked, the 19th of May?

Mr. Rank: I believe so.

Mr. Phelps: And Tuesday the 19th was the day that the signs were posted, is that right? [690]

Mr. Rank: I think the gates and the signs went up the same day.

Mr. Phelps: But they were not locked until Wednesday morning, the 19th?

Mr. Rank: I think they were locked the same day they were put up, Mr. Phelps, is my recollection.

Q. (By Mr. Phelps): Now, on that occasion, when you were in Mr. Paul Owens' office, who else was present? A. Roscoe Denny.

Q. Who was he?

A. He was a gyppo—what they call a gyppo logger.

Q. What do you mean by that?

A. He had the contract for logging the logs.

Q. So he was an independent contractor logging in the same area? A. Yes, sir.

Q. Is that right? A. Yes, sir.

(Testimony of Ernest E. Lane.)

Q. But I didn't establish that. Were you an employee or were you an independent contractor?

A. I was an independent contractor.

Q. At that time you have told us you were logging all on Sage lands? A. Yes, sir.

Q. What did Mr. Rank tell you? What was said to you and what [691] did you say to him on that occasion?

A. He told me if I continued to log that I would have to pay—in similar words to that—stumpage.

Q. Now did he tell you anything else, do you remember?

A. Well, I can't remember much more that he said.

Q. Do you remember what you said to him?

A. I told him if that was the case, I would pay my crew off and let my crew go.

Q. And what did you do after that, then?

A. I stayed and had Mr. Owens figure out the time and collect the checks. I took them back up and give them to my crew as I went back.

Q. Did you pay them off then?

A. I paid them off that evening what I could catch along the road on my way home, and then the next day I had to go out and give the rest of them.

Q. All right. What happened to that side that you were operating after you paid them off?

A. It was down.

Q. For how long?

A. Well, I would say approximately five days.

(Testimony of Ernest E. Lane.)

Q. Was it down completely during that five days?

A. Well, I shipped one or two loads of logs; I and another man got them, until I could get the crew back together.

Q. How many men were there on your [692] crew?

A. There were between nine and eleven men.

The Court: There were between what?

The Witness: Nine and eleven.

Q. (By Mr. Phelps): How many logs on a footage basis were you averaging per day immediately prior to this incident in May?

A. Well, I was getting out around between 80 and 100 thousand a day.

Q. And how long was it before you were back in operation, normal operation, again?

A. Well, I never hardly did get back into normal operation.

Q. Did you lose any men on account of this?

Mr. Rank: Wait just a minute. To which we will object as being incompetent and hearsay.

Mr. Phelps: Well, I don't think it is, but perhaps in order to avoid the difficulty——

Q. (By Mr. Phelps): Did you lose any men immediately after this incident?

Mr. Rank: To which we will object as being hearsay and incompetetnt whether he lost any men.

Q. (By Mr. Phelps): Were there any men that did not return to work after this?

(Testimony of Ernest E. Lane.)

The Court: When you resumed your operations, how many men, if any, returned to work?

A. I believe there were one or two that didn't come back. [693]

Q. (By Mr. Phelps): And how about trucks? Will you tell the Court whether you had any difficulty with respect to obtaining trucks to load?

Mr. Rank: What period of time is this now?

Mr. Phelps: Immediately after this incident in May, 1954, that you have told us about.

A. Yes, sir, I did.

Mr. Rank: Just a moment, Mr. Lane. I ask that that answer go out subject to our objection.

The Court: It may go out.

Mr. Rank: I will withdraw the objection. I am withdrawing the objection.

The Court: All right.

Q. (By Mr. Phelps): Did you have any conversation with Mr. Harvey at any time, either before or after your conversation with Mr. Rank, sir?

Mr. Rank: May I have the question?

(The Reporter read the question.)

Mr. Phelps: If you remember. I said, if you remember, sir.

A. No, I don't remember.

Mr. Phelps: I have no other questions, your Honor. You may cross-examine. [694]

Cross-Examination

By Mr. Rank:

Q. Mr. Lane, how long have you been an in-

(Testimony of Ernest E. Lane.)

dependent logging contractor for the Union Bond and Trust? A. How long?

Q. How long a period of time, yes.

A. I took the job in April.

Q. And before April, in what were you engaged? Prior to that, what had you been doing?

A. I gyppoed before?

Q. For whom? A. For Coast Redwood.

Q. Had you gyppoed for Coast Redwood or were you working on the payroll? A. Gyppoed.

Q. At this time in May, '54, you were logging for Union; is that correct?

A. That is correct.

Q. What equipment were you using?

A. I was using a Washington Yarder and a B.U. 85 loading donkey.

Q. And who did that belong to, if you know?

A. I wouldn't say who that belonged to.

Q. Is that equipment that you had used when you been working for Coast Redwood before?

A. Yes, sir. [695]

Q. And at that time, as far as you know, at the time you were working for Coast, that was Coast Redwood equipment, was it not, as far as you knew? A. Well, I wouldn't say that.

Q. You recall our meeting in Mr. Owens' office this particular day that you spoke about?

A. Yes, sir.

Q. Do you recall that night receiving a wire from Mr. Wilson or a message from Mr. Wilson?

A. I never received a wire from Mr. Wilson.

(Testimony of Ernest E. Lane.)

Q. A message from Mr. Wilson by Mr. Charles—
Bill Charles?

A. I don't remember if it was that night or not.

Q. You remember Bill Charles coming up to
your place about two or three o'clock in the morning
with a message from Mr. Wilson?

A. Yes, sir.

Q. What was that message?

A. I couldn't tell that.

Mr. Phelps: The writing would be the best evidence.

Q. (By Mr. Rank): The message was verbal,
was it not?

A. I don't remember that now.

Q. Do you remember Mr. Charles telling you that
he had a message for you from Mr. Wilson?

Mr. Phelps: I object to that, if your Honor
please——

Mr. Rank: This is cross-examination. [696]

The Court: I will allow it. I don't know what it
is.

Q. (By Mr. Rank): Do you recall Mr. Charles
telling you that Mr. Wilson told him to tell you
that the matter had been settled and for you to go
back to work the next morning?

Mr. Phelps: The same objection.

The Witness: I don't remember that.

Q. (By Mr. Rank): Do you remember receiving
a message like that—similar to that, Mr. Lane?

A. No, I don't.

Q. Do you remember talking to me on the job

(Testimony of Ernest E. Lane.)

the next day? A. No, I don't.

Mr. Phelps: What date would that be?

Mr. Rank: It was the day following this conversation.

Q. (By Mr. Rank): Do you remember Mr. Fleckner coming down to where you were working the late afternoon of the next day?

A. No, sir, I don't.

Q. Do you remember you had a cat stuck up on the hillside right above your loader?

A. Well, I have had several cats stuck.

Q. Do you remember telling me about it, showing it to me?

A. I don't remember that.

Q. Do you remember my telling you in front of Mr. Fleckner on that day that the message you received from Mr. Wilson was wrong and that the matter had not been settled?

Mr. Phelps: If your Honor please, this is all self-serving. [697]

Mr. Rank: I certainly have the right to cross-examine him.

The Court: There is no such thing as self-serving cross-examination.

The Witness: I don't remember that.

Q. (By Mr. Rank): I beg your pardon.

A. I don't remember it.

Q. You don't remember talking to me down on the job? A. No, sir, I do not.

Q. Or Mr. Fleckner? A. No, I do not.

Q. Maybe two or three hundred yards, right above where you worked?

(Testimony of Ernest E. Lane.)

The Court: How did you know how to go back to work—when to go back to work?

The Witness: Well, the rest of the crews went back and they told me to go back.

The Court: Who told you to go back to work, do you remember?

The Witness: No, I don't remember just who told me to go back to work, your Honor.

Q. (By Mr. Rank): Mr. Lane, you know as a matter of fact, do you not, that you didn't miss a day there? A. I didn't miss a day?

Q. Yes. [698] A. Oh, yes.

Q. Do you remember telling me, Mr. Lane, after talking to Mr. Owens that evening, that you paid off your men— A. Yes, sir.

Q. —on the night before, and then after the phone call from Mr. Wilson or message, rather, from Mr. Wilson, that you had to get up at three or four o'clock in the morning and round your men up and get them back on the job?

A. No, sir, I never left at three or four o'clock in the morning. [699]

Q. Well, do you remember telling me that you had to go back the next morning, go out the next morning and round up your men and the crew to get them on the job?

A. I don't remember that.

Q. Do you remember doing that, when you went back to work? A. It wasn't the next day.

(Testimony of Ernest E. Lane.)

Q. Well, do you remember going out early in the morning and rounding up your men to get them back on the job? A. No, sir.

Q. Well, how did you get the message to your crew to go back to work?

A. I went out and told them a day or two afterwards.

Q. And you don't remember receiving a message from Mr. Wilson? A. I don't remember it.

Mr. Rank: I believe, if the Court please, that the affidavits of Fleckner and Harvey are in evidence, are they not?

Mr. Phelps: Yes, they are.

The Court: The affidavits that were attached to the complaint?

Mr. Rank: Yes.

The Court: Well, it was deemed that they would testify as stated in the affidavit.

Mr. Phelps: Yes, that was the language, it would be deemed. [700]

Mr. Rank: That's all.

The Court: All right, that's all.

Mr. Phelps: I have no questions. Thank you.

(Witness excused.)

Mr. Phelps: Mr. Trotter.

The Court: I don't mean the affidavit attached to the Complaint; the affidavits attached to the Application for the Injunction.

Mr. Rank: No, that's correct.

Mr. Phelps: That's correct, if your Honor please. Mr. Trotter?

JAMES TROTTER

was called as a witness on behalf of the plaintiff herein, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court, sir? A. James Trotter.

Q. T-r-o-t-t-e-r? A. Yes, sir.

Direct Examination

By Mr. Phelps:

Q. All right, sir. Mr. Trotter, you live where, sir? A. Klamath. [701]

Q. California? A. Klamath, California.

Q. And what is your business, that is, what is your general occupation?

A. Construction, road construction mostly.

Q. And how about with respect to logging or timber? Do you have——

A. We have been logging some, yes.

Q. Mr. Trotter, in May of 1954, what was your position or job?

A. We were working for the Union Bond & Trust, logging there, at that time.

Q. And what was your job with respect to that, what were you doing?

A. I was the foreman, woods foreman.

Q. Woods foreman? A. Yes.

(Testimony of James Trotter.)

Q. All right. Now in May of 1954, just preliminarily, you will recall, will you not, the time when some signs were posted by the Wards and barricades were placed? You remember that incident?

A. Yes, sir.

Q. All right. Now what was the first that you knew about this effort to oust the Wilson or Union Bond out of possession, when did you first know about it? [702]

A. Well, I believe it was—I believe it was Tuesday the——

Q. Would that be the 18th of May?

A. I kind of think it was, yes.

Q. Well, it was Tuesday of that week, at any rate?

A. How's that?

Q. It was Tuesday of that week, in May?

A. That's right, it was. It was Tuesday, I am sure.

Q. All right; and how did you come to know about it?

A. Well, I met, our trucks, we didn't have any trucks that morning to speak of. We was getting awfully short of trucks. They kept dropping off. And I was going down to see Mr. Waldkirch to see what had happened to the trucks, and I met Mr. Rank and Mr. Fleckner on the road and that was just about the first that I had known anything about it at all.

Q. All right. Now let's go back. You say that you were not getting trucks in the woods?

A. That's right, yes.

(Testimony of James Trotter.)

Q. And so what were you—you mentioned a person's name. What were you going to do because of that?

A. I was trying to get some trucks.

The Court: He already said it. Don't go over it again.

Mr. Phelps: All right, your Honor.

Q. Who was this Mr. Waldkirch that you were going to see and what was his position?

A. He was the trucker. He had the trucks on the jobs there, [703] had his own trucks there and he had some hired trucks that were coming up at the same time.

Q. All right. And so did you see him?

A. Yes, I did, yes.

Q. And where was that and when?

A. It was on the road this side of Oregon.

Mr. Rank: You were talking about seeing me?

Mr. Phelps: No, no, Mr. Waldkirch first and then you.

A. (Continuing): It was right there by the Berry Glen. It is a little store and a little restaurant or something.

Q. (By Mr. Phelps): Is that on the main highway, 101? A. It is, on 101 there.

Q. All right. At that time, when you met him, where was Mr. Waldkirch going?

A. He was coming up to see me. He had been—the trucks hadn't been showing up that morning. Some of the contract trucks. And he was coming up to see why he had—there had been some talk,

(Testimony of James Trotter.)

I guess, of this, and the trucks didn't show up that morning, so he was coming up to see me and we met there on the road.

Q. Now—— A. I hadn't——

Mr. Rank: Well, just a moment.

Q. (By Mr. Phelps): You let me proceed. All right. Now without stating what it was, now, did you have a conversation [704] with Mr. Waldkirch then about the trucking situation?

A. Yes, I did, yes.

Q. And then you have already told us, Mr. Rank and Mr. Fleckner came along?

A. Yes, that's right.

Q. All right. Now what happened at that time, what was said to you and what did you say to them?

Mr. Rank: You mean Mr. Rank?

Mr. Phelps: Mr. Rank and Mr. Fleckner on that occasion.

A. Well, they wasn't a great lot said.

Q. (By Mr. Phelps): What did you say to him?

A. I can't remember us saying—just what was said there. After the conversation went on there for a little while, Mr. Rank and Mr. Fleckner there told me what they were again, to do up there. They were going to——

Q. All right, what did they tell you about that?

A. They were going to close the outfit there, close the roads there, something to that effect. Anyway, we weren't supposed to log any more there for a while.

(Testimony of James Trotter.)

Q. Is that what they told you?

A. Yes.

Q. And what did you respond to that?

A. I asked them on what grounds they were going to stop the thing and Mr. Rank, I believe, told me that they were going to—I just can't remember what the answer was on that. [705]

Q. Did you ask him anything about——

Mr. Rank: Just a moment, now. Don't lead him, Mr. Phelps.

Mr. Phelps: Well, this is not leading. I can ask whether or not anything was said on the subject of whether or not he had any papers, court papers, with him.

A. I believe he did say that he had some or was going to have some right away on that.

Q. (By Mr. Phelps): Do you remember whether he had any at that time or whether he said he did or did not?

A. Yes, yes, I believe he did say that there were some, that he had some papers that day.

Q. All right. Was anything said, if you recall, with respect to whether an injunction had or was going to be issued?

Mr. Rank: What was that question?

Q. (By Mr. Phelps): Was anything said at that time as to whether an injunction had or was intended to be issued?

The Court: Mr. Phelps, what's the point of this? I thought that this was covered in the pre-trial conference, that these notices were put up and these

(Testimony of James Trotter.)

barricades were set up on the 18th. All you are having the witness do is testify to that fact.

Mr. Phelps: All right, then I will pass on, if your Honor please, to the next subject.

Q. All right, what did you do after that?

A. We didn't get very much done after that. That day we got [706] a few loads of logs, but not many. Our trucks, we had our crew out that day, but they was, the logs was, we didn't have many trucks.

Q. All right. Now what about the next day, Wednesday? Anything happen on that day?

A. I think not. I think the gates were up that day and we didn't get any logs out of the woods at all. If I remember correctly, I think it was along in the afternoon, late in the afternoon, we had a bunch of logs, reload, I think there was either, I wouldn't say for sure, three or four trucks, maybe, loaded down at the reload. Maybe not that many. I wouldn't say for sure.

Q. All right. Now how about you? Did you lose any men that were working under you at that time?

A. Yes, I did.

Mr. Rank: Just a moment, please.

Mr. Phelps: Just let me finish the question. Don't you answer.

The Court: Well, how long did you stop work?

Mr. Rank: Well, I don't think it has been established just who this man was working for or what he was doing.

The Court: Who were you working for?

(Testimony of James Trotter.)

The Witness: Union Bond & Trust.

Mr. Rank: As an employee? Is that it?

The Court: You were an employee of the Union Bond & Trust? [707]

The Witness: Yes.

The Court: How long did you stop work? You?

The Witness: Well, we were——

The Court: Can you tell me in days?

The Witness: It seems to me as though, it has been some time back and—but it seems to me as though we was off about three days, I believe.

The Court: All right. How many men were under you?

The Witness: I had about nine, I think, at that time.

The Court: All right. Now after you stopped work and went back to work, how many employees reported back to work?

The Witness: I was five short.

The Court: You were five short after you started working again?

The Witness: Yes, that's it.

The Court: Go ahead.

Q. (By Mr. Phelps): Were you short any particular employee who was a key man?

A. Yes, I lost the track loader operator and that was a very important man.

The Court: What did he do, go some place else to work?

The Witness: He did, yes.

(Testimony of James Trotter.)

Q. (By Mr. Phelps): And did you get those men back?

A. No, no, I never did get him back.

Q. Now what was your—prior to this what was your average, [708] what were you taking out of the side that you were operating for Union Bond?

A. Well, we were getting about, from——

Q. If you can tell?

A. I would say 80 thousand, I believe, around 80 thousand a day.

Q. All right. Now at that time, sir, as far as you were concerned, the particular operation that you were supervising, will you state whether or not that was on Ward or Sage land, as you recall it, if you can recall it? We can establish from other means if you don't know.

A. Yes. I believe that was on Sage, I believe it was.

Q. Well—— A. I am not too sure.

Q. Well, the record of Mr. Harvey shows at that time it was on Pole 100-E.

A. Oh, that would be——

Q. Triple Drum, and that would be Ward. Does that refresh your recollection?

A. Yes, that would be Ward. I was referring to the track loader. I think—you see, we had them separated there.

Q. I see. The track loader, however, I think, was on Sage? A. That's right, yes.

Mr. Phelps: All right. Just one moment, your Honor. I have no other questions. [709]

(Testimony of James Trotter.)

Cross-Examination

By Mr. Rank:

Q. Good morning, Jim.

Mr. Rank: Mr. Trotter and I have known each other quite a few years.

Q. Jim, when we met on the road, I showed you the contract, the Ward contract, didn't it?

A. No, Fred, I can't remember of seeing the contract.

Q. Didn't I show you the contract and point out to you what had happened, that Wilson had failed to report and pay for logs?

A. I don't believe that I noticed there, or saw the contract, Fred. We talked some on that, not—but as far as me looking at the contract, I didn't know.

Q. I thought I did, but I know you would remember if I did. Now Mr. Trotter, you say you were woods foreman? A. Yes, I was.

Q. And on whose payroll? Who did you get your checks from?

A. We were working for the Union Bond, but the checks was, come through Coast Redwood and they were, Union Bond reimbursed Coast.

Q. Well, you don't know whether Union Bond reimbursed Coast or not, do you? You don't know anything about that yourself? A. Well, no.

Q. You were told to say that, weren't you, if I asked that question? [710]

(Testimony of James Trotter.)

A. No, that's the way we had that. That was the way it was in the woods there, you see.

Q. You don't know, you have never been in the office or seen any reimbursement or anything of that nature, have you? A. Well, no, I haven't.

Q. No. A. I haven't.

Q. Actually, Mr. Owens testified here, for your information, that the only employees who were being reimbursed were Doxie and the two scalers.

Mr. Phelps: Well, I don't think that is quite accurate, because I think he later added the others.

Mr. Rank: That is what he testified.

Mr. Phelps: Certainly he can't come in on somebody else's testimony, so I will object to it.

Mr. Rank: All right.

Q. (By Mr. Rank): So far as you were concerned, you were woods foreman, but were you running any particular side yourself?

A. Yes, I had the track loader and a double drum down in there, one in there.

Q. Let me show you the diary of Mr. Harvey, and I am referring to—I don't know what exhibit number this is. Oh, yes, Plaintiff's Exhibit 7-French. Calling your attention to the page, report of Ernest Harvey's activities, 5/10 to 5/14— [711]

Mr. Phelps: May I see it, too?

Mr. Rank: Yes.

Q. (By Mr. Rank, continuing): Can you just go through this, Jim, and tell which operation you were conducting? A. That one.

Q. The track loader?

(Testimony of James Trotter.)

A. On E, yes, on 100-E.

Q. Triple drum and two cats?

A. Yes, that's right.

Q. And that's the side that you were running yourself?

A. Yes, that's right, Fred.

Q. And how long had you been running that side or how long had you been operating that?

A. Ever since it was run on the 100 there.

Q. On the 100 road?

A. Yes, we started it.

Q. You weren't an independent contractor like Mr. Lane?

A. No, no.

Q. And had that triple drum then on the operations a long time up there?

A. Yes, it has been there ever since it was new.

Q. And how long ago was that?

A. I just can't say, Fred, offhand.

Q. I mean, two years, three years, four years?

A. I would say between two and three years, yes. [712]

Q. And that was while Coast Redwood was operating?

A. That's right.

Q. And that was a piece of equipment that was being operated by Coast Redwood when it was first new, is that it?

A. That's right.

Q. Your employees were being paid the same as you, were they not? In other words, by Coast Redwood?

A. That's right, they was, m-hm.

Q. Yes. And how long had you been, as you say, working for Union Bond?

(Testimony of James Trotter.)

A. We had been over on the—I just can't remember, Fred, when we did go over.

The Court: Well, you have got the records, haven't you? There's other data that shows just when Union took over?

Mr. Rank: No, that isn't the point of that question, if the Court please.

The Court: I beg pardon?

Mr. Rank: That isn't the point of that question.

Mr. Phelps: Well, the record will show also exactly when he took over, the Harvey record.

Mr. Rank: No, no record shows when he first went to work for Union Bond up there, on his own.

The Court: What work was being done by Union Bond is shown, isn't it?

Mr. Rank: Yes, oh, yes, but that isn't my question. My [713] question to this witness is—

The Court: Well, then, if you know what work was being done by Union Bond and the diary shows at what point this man was working, then you are able to determine and advise the Court as to whether at that time he was working for Union Bond or not.

Mr. Rank: No, the diary doesn't show that, no.

Mr. Phelps: Yes.

Mr. Rank: The diary just shows the equipment.

Mr. Phelps: The record, though, does, the very time he started.

The Court: Well, that ought to be a matter of record.

Mr. Rank: Well, that's all, Mr. Trotter is one of the top men up there, if the Court please. I

(Testimony of James Trotter.)

have known Jim a long time and he is a very fine, honest man.

Mr. Phelps: Do you have any more questions?

Mr. Rank: No, no more questions.

The Court: All right, that's all.

(Witness excused.)

Mr. Phelps: The last two witnesses may be excused, I assume?

The Court: Very well.

Mr. Phelps: Mr. Waldkirch. [714]

WALDO WALDKIRCH

was called as a witness on behalf of the plaintiff herein, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

A. Waldo Waldkirch.

Q. Would you spell your last name?

A. W-a-l-d-k-i-r-c-h.

Direct Examination

By Mr. Phelps:

Q. Where do you live, sir?

A. Orick, California.

Q. All right. What is your business or occupation?

A. I am a trucking contractor.

Q. And as such, sir, in May of 1954, how many rigs did you have and operate?

A. Had 17, 17 trucks.

(Testimony of Waldo Waldkirch.)

Q. And as of May, 1954, sir, did you have an arrangement and if you did, please state what it was, with respect to supplying trucks for the Union Bond & Trust Company and Coast Redwood operations on the Ward and Sage lands covered by this map? A. I had a contract.

Q. All right. Now how many trucks were you supplying of your own trucks at that time? [715]

A. It was 11 or 12, I don't know for sure, of my rigs I had on the job.

Q. And in addition to that, had you undertaken to supply any trucks of independent truckers?

A. Yes, sir.

Q. For the job? A. Yes, I did.

Q. And how many such?

A. Well, at that time we had around 34 trucks on the job.

Q. And at that time and prior to the middle of May, 1954, about how many loads a day would those 34 trucks average?

A. I would say between 60 and 70.

Q. Now you recall the time—and this is just to fix the time for you, sir, the time when there was an effort to cancel the contract and there was this trouble up there with respect to the Ward lands? Do you recall that time in May of '54?

A. Yes, I do.

Q. All right. Now what was the first difficulty or trouble you had with respect to your truckers, the supplying of your trucks? A. Well—

Q. When did you first learn of it?

(Testimony of Waldo Waldkirch.)

A. Well, my wife called me when I was in Portland, Oregon and says there was not very many trucks in the woods all Monday morning, and wanted to know what had happened. [716]

Q. When was this? A. What day?

Q. Yes, when was it? Well, I mean was this Monday evening?

A. No, it was Monday, I think around noon or so.

Q. And by Monday, that would be the 17th of May? Can we spell that out on the calendar?

A. Well, I would have to look on the calendar to see.

Q. All right. At any rate, it was the Monday of this week when all this happened?

A. Yes, that's when she called me.

Q. All right. What else did you learn on that occasion?

A. You mean what else did I, what did I tell my wife or what did I do?

Q. No, don't do that. Tell me this. Had you heard any rumors that the work would be stopped before that time?

Mr. Rank: To which we will object as being immaterial.

Mr. Phelps: I don't know—rumors and hearsay—hearsay is one thing, but——

Mr. Rank: Rumors? My goodness!

Mr. Phelps: Rumors circulate——

The Court: Well, let's get on with it. What's the importance of all this business in the case?

(Testimony of Waldo Waldkirch.)

Mr. Phelps: All right.

Q. Tell us, what did you do then? And let's take up Tuesday. What did you do Tuesday with respect to these trucks and what [717] did you find out?

A. Well, there was a lot of men down in my place, so I started up to the woods to find out what the trouble was. That was Tuesday morning some time. I, at about that same time I met Jim Trotter coming down to see me, why I didn't have any trucks in the woods.

Q. All right. And do you remember Mr. Rank and Mr. Fleckner coming up?

A. Just as I was getting ready to leave, why, Mr. Rank had walked up and started talking to Jim. I remember him coming up.

Q. What did you do then?

A. I turned around and left.

Q. All right. Now then, on Tuesday, how many trucks did you have on the Union Bond Company's job?

A. Oh, I would say probably six, eight, someplace in there. Most of which was my own, which wouldn't—I would send them up and they would come back and I couldn't tell exactly how many loads we got out. Seemed like as I would send them to the woods, somebody else would talk to them and turn around and send them home, so that was why I was going up there, to try to get it straightened out, what was the matter.

(Testimony of Waldo Waldkirch.)

Q. All right. How about the next day? What happened the next day?

A. Well, the next day the truckers all asked me what to do. I told them to go to work. As far as I knew, we was going to [718] work, because they had logs, I was supposed to call them. And the next morning somebody come down and told me the Sheriff was up there, and so I started up then to see what to do, because I didn't want my truck drivers to get in no trouble.

They was, you know, there was signs up. They told me the gates was locked. And on the way up there I had met the sheriff and Ernie Harvey. They was pulled over to the side of the road talking, so I stopped and talked to them. [719]

Q. What did Mr. Harvey say to you, do you remember?

A. At that time he asked me if I had got my money. I told him I just got a check from them, and he asked me if I was going to continue to haul, and I told him I was.

The Court: I don't see the materiality of all this, Counsel.

Mr. Phelps: All right.

The Court: This case is dragging along. This has got nothing to do with this case. How does it help me in solving this problem, the conversations this witness had with the sheriff.

Mr. Phelps: I will drop that, if your Honor please.

Q. (By Mr. Phelps): Now Mr. Waldkirch, will

(Testimony of Waldo Waldkirch.)

you just tell the Court what happened with respect to the supplying of trucks? Did you lose them, did you get them back, and if so, when—just as quickly as you can.

A. Well, I had lost a lot of trucks.

The Court: Let me ask the question.

Mr. Phelps: Certainly.

The Court: You ask these questions so that the witness makes a speech to us. How many trucks did you have in operation on the date that the barricades went up, about? A. Six or eight.

Q. How long did you stop operations?

A. Well, we never—we always got out a few loads a day. [720]

Q. On how many days did you get just a few loads out?

A. Well, I would say probably ten. I never did get as many loads out as we did before.

Q. When did you go back? How soon did you go back in number of days to normal operations or approximately normal operations?

A. Well, it took quite a little while for us to get the trucks; I never could get them all back.

Q. How many of them did not return, approximately?

A. Oh, I would say offhand around ten.

Q. And you never did get them back?

A. No.

The Court: Anything else of the witness?

Mr. Phelps: One moment.

(Testimony of Waldo Waldkirch.)

Q. (By Mr. Phelps): At that time in May, 1954, sir, would you tell me, were trucks in demand?

A. They was pretty hard to get summertime.

Mr. Phelps: I have no other questions.

The Witness: Not summertime; I mean hard to get.

Mr. Phelps: You may cross-examine, Mr. Rank.

Mr. Rank: No questions.

The Court: That is all, sir.

(Witness excused.)

Mr. Phelps: Mr. Brozovich, will you take the stand? We can go on and probably finish this witness. I think he will take about ten minutes. [721]

The Court: All right.

JOHN BROZOVICH

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court, sir.

The Witness: Brozovich.

The Clerk: Your first name?

The Witness: John.

The Clerk: Please spell Brozovich.

The Witness: B-r-o-z-o-v-i-c-h.

Direct Examination

By Mr. Phelps:

Q. And you live where, sir? A. Eureka.

(Testimony of John Brozovich.)

Q. And what is your occupation?

A. Generally logger.

Q. And in May of 1954, what was your job?

A. Bull bucking for Union Bond and Trust.

Q. Just tell the Court what a Bull bucker is?

A. A bull bucker has charge of the falling and bucking of timber and logs, the preparation for logging, actual logging.

Q. When did you first go to work for Union or any company affiliated with Mr. Wilson?

A. April 16th of that same year. [722]

Q. April 16th, 1954? A. Right.

Q. In May, 1954, sir, will you state to us, will you tell the Court what the situation was with respect to the falling and bucking on the Ward land? Was there anything being done in that respect?

A. I didn't have anything to do with the Ward land. The falling and bucking was completed on the Ward land when I took the job.

Q. On April 16, 1954? A. Right.

Q. So that the only thing that remained was the other part of the job, the yarding and loading out?

A. That's right.

Q. Now just quickly tell me this, sir, with respect to your operation, that is, the cutting and the felling, how many men did you have under you?

A. Oh, I would say about thirty or thirty-five.

Q. And did that include both the cutters and the peelers? A. Right.

Q. And you were doing all that work on the

(Testimony of John Brozovich.)

Sage lands? A. That is right.

Q. Do you recall the time when the signs were posted and barricades were put up in the middle of May? A. Yes. [723]

Q. After that did you lose any men?

A. We lost them at the time of the barricades and this issue that came up, yes.

Q. Did you lose any work?

A. No, we never lost full; we had a partial crew out for a time there.

Q. Did you lose any cutters? A. Yes.

Q. And how many?

A. Right at that time, I believe, that week we have lost eight cutters, and also some peelers.

Q. All right. And did you ever get those men back? A. Excuse me, it was four cutters.

Q. And when did you get them back?

A. Well, it took a considerable time to replace them. We have got inexperienced men and we never got into full cut. That is, the cut that we wanted to cut, for a considerable time.

The Court: And do you mean that when this event took place, this barricading and so forth, that some of your men working under you, cutters, left and got other jobs? A. Right.

Q. And you didn't get them back?

A. That's right.

Mr. Phelps: Do you recall an incident, sir—this is [724] just preliminary and I will ask you a question later—do you recall an incident where the men were at a barricade and were not going to

(Testimony of John Brozovich.)

go to work that morning in the middle of the week?

Do you remember that? A. Yes, sir.

Q. What did you do when that happened?

A. In the morning of the barricade?

Q. Yes.

A. Well, I went and tore down the barricade on the 230 road and—well, the men had congregated at the junction of 230 and I believe it is the 240 road.

Q. Why weren't the men going to work?

Mr. Rank: To which we object.

Q. (By Mr. Phelps): Why weren't the men going to work?

Mr. Rank: To which we object.

The Witness: The road was barricaded.

Mr. Rank: Just a moment.

Mr. Phelps: Let him state his objection.

Mr. Rank: To which we will object.

The Witness: The road was barricaded.

The Court: Not why they weren't going to work. What did you do? What happened?

The Witness: I came up on the job about 7:30 in the morning, and I seen the men congregated and I asked them why they weren't going to work, and they said they couldn't get in [725] because the roads were barricaded.

Q. (By Mr. Phelps): Had Mr. Harvey been there?

A. Mr. Harvey was there; he was in with this group of men there.

(Testimony of John Brozovich.)

Q. Was anything said at that time with respect to what Mr. Harvey had said to them?

A. Not right at that time, no, there wasn't. As a matter of fact, I didn't stop; I just talked with my men; I didn't speak to Harvey at all. I asked them what the reason was they didn't go to work.

Q. What did the men tell you with respect to that?

A. Well, after this issue, that is, after the men——

Mr. Rank: Just a moment. I will object to that as being hearsay. I don't like to object to it, but I don't think he should go that far.

Mr. Phelps: I had in mind—Let me tie it down——

The Court: They went up there and they stopped operations. I thought you stipulated to that at the time of the pre-trial. That is what they did. They claimed the contract was cancelled and they stopped the operations by putting up barricades and blocking roads and so forth. That is admitted, isn't it?

Mr. Rank: We didn't stipulate to stopping operations; we stipulated to putting up barricades and the notices and so forth. [726]

Mr. Phelps: The point is, if your Honor please, they have not stipulated——

The Court: The net result of that was for sometime these operations were either stopped or reduced.

Mr. Rank: Curtailed.

Mr. Phelps: I want to establish from this wit-

(Testimony of John Brozovich.)

ness a matter that has not been stipulated to, and if you want to consider an offer of proof, yes. I want to try to prove from this witness that Mr. Harvey told the men up there that Union Bond and Trust and Wilson was going bankrupt and they wouldn't get paid if they worked.

The Court: Well, you can't do that by double-hearsay. You will have to do that by inquiring of Mr. Harvey, if he will admit it, or someone who talked to him. You can't inquire from this witness.

Mr. Phelps: That is the additional factor I wanted to bring out from this witness.

The Court: That is clearly objectionable.

The Court: Did Mr. Harvey tell you?

The Witness: No, sir.

Q. (By Mr. Phelps): Did the men tell you at the time—the reason I am asking this question, the foundation is for this reason—I will point out the significance of it if the Court please—did the men tell you where they were congregated at that time and stopped, did they tell you what [727] Harvey said to them? Don't answer—just yes or no.

Mr. Rank: To which we will object as being immaterial and hearsay.

Mr. Phelps: That is preliminary to something else.

The Court: I will sustain the objection.

Mr. Phelps: Don't answer. The point I have in mind, if your Honor please, and wanted to reach, is an exception to the hearsay rule, that it is part of the *res gestae*.

(Testimony of John Brozovich.)

The Court: There is no *res gestae* involved in that. This is a contractual matter, and the other side has no opportunity to conduct cross-examination. I don't know whether it is true that Harvey said it or not.

Mr. Phelps: Then I have no other questions, your Honor.

Cross-Examination

By Mr. Rank:

Q. Who were you getting your paycheck from? What paycheck was it? A. Coast Redwood.

Q. Coast Redwood. Now the men that you were directing, the peelers and buckers, whose check were they getting? A. Coast Redwood.

Q. And all of the felled and bucked logs on the Ward land when you arrived on April 16th, they were all subsequently removed, they were all yarded and loaded out?

A. I couldn't say as to that. I wasn't on the Ward property, [728] that is, up in the active logging at all.

Q. Have all of the felled and bucked logs that were on that Sage property, to your knowledge, been removed? A. At the present day?

Q. Yes. A. I believe they are.

Q. You were the man, were you not, that during this congregation pulled a chain out of your truck and put it over the Ward gate and started to pull it down? A. That's right.

Q. And Mr. Harvey started to take a picture

(Testimony of John Brozovich.)

of you? A. Yes.

Mr. Phelps: I object.

Q. (By Mr. Rank): And then you stopped, of course?

Mr. Phelps: I submit I didn't go into that.

Mr. Rank: He testified he tore the gates down.

Mr. Phelps: Go ahead.

The Court: He said he tore the barricade down.

Mr. Rank: Then you stopped, did you?

(No response.)

Mr. Rank: I just wanted to point out to the witness that the camera was empty. That is all. No further questions.

The Court: We will take a brief recess.

(Short recess.) [729]

Mr. Phelps: May it please the Court, I had another witness, or in fact two, whom I brought down and intended to call, and after consideration and talking during recess with Mr. Mills, I am inclined to agree with your Honor that the case has, of course, dragged and I am going to forego that, so that we can proceed with the case with dispatch. There remains, then, if your Honor please, only the matter of perfecting the record with respect to some of these exhibits which I think we can quickly handle.

The first matter, Mr. Clerk, Plaintiff's Exhibit 1 on the pre-trial order, for Identification, which are the letters of acknowledgment for the June to

October payments. We offer those in evidence as Plaintiff's Exhibit 1 on pre-trial and ask it be given the next number in order in evidence.

Mr. Rank: No objection.

The Clerk: Plaintiff's Exhibit 1 admitted into evidence.

The Court: Well, we have got a Plaintiff's Exhibit 1 already.

Mr. Phelps: No, it was marked Plaintiff's Exhibit 1 on the pre-trial. Plaintiff's Exhibit 1 on this trial is——

The Court: We already have a Plaintiff's 1 here. We will give it a new number. Plaintiff's what?

The Clerk: Plaintiff's No. 27 introduced and filed into evidence.

(Whereupon Plaintiff's Exhibit No. 1 [730] for Identification only on the Pre-Trial was received in evidence and marked Plaintiff's Exhibit No. 27.)

Mr. Phelps: Now the next matter, if your Honor please, is Plaintiff's Exhibit 2 on Pre-Trial, which is marked Plaintiff's Exhibit 3 for Identification on this trial, which is that letter from Mr. Holter to Mr. Ward, and with respect to rights-of-way.

The Court: Yes.

Mr. Phelps: I have not made a formal offer of proof. I would like to offer that in evidence at this time as a part of the Plaintiff's case.

Mr. Rank: To which we will object, if the Court please, as being immaterial, incompetent, in that the

document does not purport to be an agreement, and in fact all it is is a letter to the effect that an agreement may be entered into.

The Court: Well, I think the objection may go to the weight rather than to the admissibility. It may be admitted as Exhibit 3.

The Clerk: Plaintiff's Exhibit 3 admitted into evidence.

(Whereupon Plaintiff's Exhibit No. 3 for Identification only was received in evidence.)

Mr. Phelps: Now the next matter, and this is technical, I believe that this map, which is marked Plaintiff's Exhibit 14 for Identification, has not been introduced in evidence and I will offer that in evidence. [731]

Mr. Rank: No objection.

The Court: Admitted.

(Whereupon Plaintiff's Exhibit No. 14 for Identification only was received in evidence.)

Mr. Phelps: The next matter we can handle best perhaps by stipulation with respect to Defendant's Exhibits P, Q, R, T and X, which are the books of accounts that have been produced here by Mr. Owens, and the photostatic copies of that stump-age record which you produced.

Mr. Rank: That's T.

Mr. Phelps: That's T. With respect to each of those, may we have a stipulation that they may be deemed in evidence, but rather than burden the

record, that either party may designate such parts thereof as they wish to use and either on argument or submission, so that they may then be before the Court, but rather than burden the Court with the voluminous records that are not considered material by either party, can we just have an agreement that if we do designate the parts and refer to the parts, that the Court may have them before him as though they were in evidence?

Mr. Rank: As far as R, Q and P are concerned, I have no objection. Those are the three books brought in first. I have no objection to anything you want to do with those, first. As a matter of fact, I was going to suggest that they could be withdrawn. I don't care. If you want them [732] here for any purpose, that's all right, and any arrangement. But as far as X is concerned, I may want to actually put that in evidence. I don't quite understand counsel's proposal. I don't know how they can be in and be out. Anything that we want to do with the first three is all right, withdraw them if you want. I don't care. But X is a little different story.

Mr. Phelps: Well, with respect to the first three there, the main portions of them that we want to refer to, and we can take a summary, just as you have done with respect to some of your exhibits, if we could make a summary of them at a later time and if it can be stipulated that we may make such a summary and use it, substitute it, then it can then be before the Court without all that extraneous matter burdening the record. That's—

Mr. Rank: You are going to leave them here, is that it?

Mr. Phelps: Yes.

Mr. Rank: I don't care.

Mr. Phelps: Is that satisfactory?

The Court: Whatever you gentlemen wish.

Mr. Rank: All right. Mr. Fletcher suggests if you know what parts you have in mind, that you point them out now and——

Mr. Phelps: The point that I had in mind is contained in the log haul book, the one I have in mind at the moment is [733] Defendant's Exhibit P, which is the log haul book. With reference to that, if—well, I will offer the whole book, but I didn't want to offer the whole and encumber the record. But I wanted to just have a stipulation that we may use such portions of it as either side may deem material, and it may become a part of the record insofar as either party designates the parts. Seems to me that is a practical way to handle it.

Mr. Rank: Well, I can see no quarrel with that if the whole book is there, and may it be left here until the final conclusion of this matter, then? Is that it?

Mr. Phelps: Yes. Now Exhibit T——

Mr. Rank: I am going to offer that in evidence.

Mr. Phelps: That is in for identification. I think it ought to be introduced in evidence.

Mr. Rank: I am going to offer it, I mean, I intend to offer it.

The Court: Well, T admitted.

Mr. Rank: Well, I intended to offer it as part of my case.

Mr. Phelps: Well, let it be——

The Court: What's the difference?

Mr. Phelps: Introduced?

The Court: Put it in now. Admitted.

Mr. Rank: All right, admit it now.

The Clerk: Defendant's Exhibit T admitted in evidence. [734]

(Whereupon Defendant's Exhibit T for Identification only was received in evidence.)

Mr. Phelps: Why don't we do the same thing——

Mr. Rank: Yes, why don't we do the same thing with the cash book, then, Defendant's X?

Mr. Phelps: You want to offer it? You may. Or we can have a stipulation that we just had with regard to the others. I have no objection to it, so——

The Court: All right, what's it, T?

Mr. Phelps: T.

Mr. Rank: No, that's X.

Mr. Phelps: Yes, X.

The Court: All right, admitted.

(Whereupon Defendant's Exhibit X for Identification only was received in evidence.)

Mr. Phelps: Now the next matter, and this is again to perfect the record, if your Honor please, the two title records from the Belcher Abstract and

Title Company, and we offer those in evidence at this time.

Mr. Rank: To which we object as being hearsay and immaterial. They are the ones that show the possibility of a——

The Court: Plaintiff's Exhibit 19 for Identification?

Mr. Rank: Yes, your Honor.

The Clerk: Yes, sir. [735]

Mr. Rank: It's the two title reports that were introduced, I think, for the purpose of showing a lien by reason of a writ of attachment. I think that's entirely immaterial and it's hearsay also, for the purpose of proving a lien.

Mr. Phelps: I am just making my offer, and you have made your objection.

The Court: Well, it may be admitted for whatever it's worth.

The Clerk: Plaintiff's Exhibit 19 admitted into evidence.

(Whereupon Plaintiff's Exhibit 19 for Identification only was received in evidence.) [736]

Mr. Phelps: With respect to the attachment, Mr. Rank, I have searched the records and a return has not been filed. The marshal's office advised me that the official return of the marshal will be filed either today or tomorrow. May we have a stipulation that when that is filed with the Clerk of the Court that it may be admitted into evidence?

Mr. Rank: Satisfactory.

The Court: Well, when is that going to be?

Mr. Phelps: Well, it will be today or tomorrow.

The Court: Very frankly, gentlemen, I expect to dispose of this case when you have finished.

Mr. Phelps: Yes, your Honor.

The Court: Or have argument and dispose of it. I am not going to wait until the marshal gets ready to file this return. If you want, I will order it filed immediately.

Mr. Phelps: All right; I want it filed.

The Court: Mr. Clerk, you tell the marshal I want that return filed today so we can have it here.

Mr. Phelps: Thank you, your Honor.

Mr. Phelps: The next matter—may we have a stipulation, Mr. Rank, that Mr. Fleckner went to various mills buying logs from Union Bond & Trust Company shortly after May 19, 1954, and advised them not to pay for the logs or they would have to pay twice and that such—

Mr. Rank: No. [737]

Mr. Phelps: Let me finish.

Mr. Rank: Yes.

Mr. Phelps: I am completing it.

Mr. Rank: Yes.

Mr. Phelps: And that he did so on the instructions from you, as he testified in his deposition?

Mr. Rank: No; the answer to that request is no. I will stipulate that he did as he so testified in his deposition.

Mr. Phelps: All right; I will accept that stipulation, and we can turn to it. I will find the exact page reference at the noon hour and we will agree upon it and then it can be entered as of record.

Mr. Rank: As I understand it, you are going to put that part of the deposition in evidence, is that it?

Mr. Phelps: No; I am just asking you if you will stipulate to the facts as stated in the deposition.

Mr. Rank: No, I suggest what you do is put that part of the deposition in the record.

The Court: He is asking you, Mr. Rank, whether you are willing to stipulate that what the witness Fleckner testified to is the fact.

Mr. Phelps: Yes.

The Court: That is what he is asking you.

Mr. Phelps: That is all I am asking.

The Court: Whether you want to do that or not is up to [738] you.

Mr. Rank: May I reserve my answer to that until I do look at the deposition?

Mr. Phelps: Certainly, that is quite satisfactory.

Mr. Rank: At the questions and answers on that.

Mr. Phelps: There is one more thing. At this time, if your Honor please, I will offer in evidence the deposition of John W. Strong, which was taken in this matter, the original of which will be in the Clerk's office, and ask that it be deemed read into evidence in entirety. I don't want to take the time of the Court to read it, but I offer it in evidence in its entirety.

Mr. Rank: We have no objection, with a stipulation that all normal objections that might be made here at the trial will be objections that the Court

can have in mind and have before it upon reading the deposition or reading any parts of it.

The Court: What is the deposition about, gentlemen?

Mr. Phelps: The deposition, if your Honor please, relates to the witness John Strong, who is one of the co-owners, as to his knowledge of the defaults, as to his knowledge of the value of the land——

The Court: You mean one of the plaintiffs?

Mr. Rank: One of the defendants.

Mr. Phelps: One of the defendants and cross-complainants, [739] and it relates to his knowledge of the defaults, his knowledge of the value of the land, his knowledge of what timber was on it, and what was discussed by the family on that occasion preceding the decision to terminate.

The Court: How long is it? How many pages?

Mr. Phelps: It is 26 pages long.

The Court: Can't you summarize his testimony for me now?

Mr. Phelps: I can endeavor to do so, but it would probably save your Honor's time by going over it over the recess and do that.

The Court: You don't recall now the circumstances of what he said?

Mr. Phelps: Yes, I do, but I wanted to be accurate, if your Honor please.

The Court: All right.

Mr. Phelps: When your Honor is asking that, I would want to be perfectly accurate.

The Court: Leave it here. I will read it over the noon hour myself.

Mr. Phelps: The plaintiff rests, if your Honor please.

(Plaintiff rests.)

Mr. Rank: I have two or three motions to make, and suppose I present those and then start the taking of testimony after lunch? [740]

The Court: You are not offering the deposition of Frederick Strong but only John Strong?

Mr. Phelps: That is right, your Honor.

Mr. Rank: These matters that I would like to present, if the Court please, can be argued at this time or be reserved until after the close of all testimony.

First of all, I move for a dismissal of all of the claims and matters presented in the amended complaint upon the ground that there has not been material proof to sustain the allegations. And we will submit that motion, if the Court please.

As I say, the ruling on that may be reserved, or if your Honor would like to hear further discussion we can discuss it at this time.

The Court: Well, that would entail your willingness to submit the case on the record now.

Mr. Rank: No, I think we have a right to make a motion for summary judgment at this time.

The Court: That is a different matter. I don't think there is such a thing as a motion for summary judgment after you have proceeded to trial.

Mr. Rank: Yes——

The Court: There is a motion for a judgment in favor of the defendant.

Mr. Rank: Similar to a non-suit on the matters presented in the complaint. [741]

The Court: On the grounds that the evidence is not sufficient to sustain the allegations of the complaint.

Mr. Rank: That is the motion I am making. I submit that motion at this time.

The Court: I am not going to grant any such motion as that.

Mr. Rank: I then move at this time for a dismissal of the claim for damages. In other words, that is a specific and separate claim in the complaint, and we do move for a dismissal of that claim upon two grounds: Number 1, that the acts that the cross-defendants are shown to have done, namely the posting of notices and the putting up of gates, under the terms of the contract were proper acts.

In other words, the contract specifically provides that upon the default—and the default is admitted and the termination notice is admitted—upon the default and the happening of that,

“The purchaser shall thereafter be barred from asserting any right, title or interest in or to this contract or to said lands or timber standing or fallen remaining thereupon.”

The Court: Does it give the right of possession upon the default?

Mr. Rank: Yes, it provides as follows:

“Seller shall have as its sole remedy the [742] right to cancel this Agreement, resume possession of the property, retain all payments theretofore made,”——

and so forth,

“——the purchaser shall thereafter be barred from asserting any right, title or interest in or to this contract or to said lands or timber standing or fallen remaining thereupon.”

That is Ground Number 1.

Ground Number 2: There is no proof of damages.

The Court: Technically, I suppose that plaintiff would not have a right to any damages if he was in default. Of course, probably a more moderate procedure would have saved a lot of trouble in this case at the time of the defaults occurring.

However, I will reserve ruling on whether or not the plaintiff would be entitled to any damages, although I am inclined to the view that if there was a default there could not be a cause of action for damages.

Mr. Rank: Your Honor of course realizes what I am doing; I am trying to narrow the issues.

The second motion is a motion for dismissal of the claim for the establishment of mutual and reciprocal rights-of-way agreement between Ward and Blue Creek Redwood Company and Sage.

The Court: That is a separate cause of action?

Mr. Rank: Yes, it is a separate statement, it is a separate [743] claim in the complaint and sets

forth separately and I believe would be considered a claim under the rules to which we could move for a dismissal.

The Court: That is a claim for reciprocal rights-of-way between Ward and Sage?

Mr. Rank: Yes.

The Court: Is Sage made a party to it?

Mr. Rank: No, it is not. In other words, it would require the establishment of an agreement between Blue Creek or its assignees, of course, and Sage Land & Lumber Company, which is not a party to this proceeding.

The Court: Well, I don't see how the Court could grant any equitable relief if the parties were all before it. How could the Court order a reciprocal agreement established entered into with a party who is not before the Court? Is that your point?

Mr. Rank: Yes.

The Court: Well, I will see what counsel has to say on that. [744]

Mr. Rank: Mr. Phelps, do I understand that you have abandoned the off-set of Speier? Will you state that for the record?

Mr. Phelps: I should have stated that for the record. I so advised you. With respect to the matter of the claimed off-set of Speier set forth, we have abandoned that claim. The evidence is conflicting and I thought we couldn't meet the burden, so I didn't introduce any evidence on it.

The Court: You have abandoned it?

Mr. Phelps: Yes.

Mr. Rank: The same question as to the claimed off-sets on the minimum payment matter. You offered no testimony.

Mr. Phelps: On that matter I offered no testimony. I am willing to submit that matter purely as a matter of construction of the contract. That may or may not become material for the Court to decide, but there is no evidence on it. It is a matter of law and construction of the contract, and of course the evidence as to how the payments were made.

Mr. Rank: Those are all the motions as far as the pleadings I have to make. Did you want to hear counsel?

The Court: The only thing I am interested in—on the point as to damages, I will simply reserve ruling on that until the case is finished, although if it appears that there was a default, then I don't know, unless counsel has some law about that, how there could be a claim for damages. [745]

Mr. Rank: The default has been admitted.

The Court: As to the matter of this claim on the right-of-way, I don't know what counsel has to say about that. I prefer to hear from you.

Mr. Phelps: Your Honor is inquiring as to the right-of-way agreement?

The Court: Yes.

Mr. Phelps: With respect to that, if your Honor please, there is no separate cause of action based upon that. We are seeking no relief against Sage Land and Lumber Company. The situation is just this: That we intended to, and pleaded and intro-

duced evidence to prove that such an agreement in fact does exist. If such an agreement does exist, then we are entitled to the benefits of that under the third party beneficial theory. And if that is the fact, then it becomes material in several respects. It becomes material, first, on the question of whether or not they were entitled, as they did, to try to keep us from using those roads at the time for removing Sage logs, and they knew that we were removing only Sage logs at that time over those roads. And if they breached their agreement—that is, if the Wards breached their agreement with Sage, that is a matter that I think the Court should consider on the question first as to the question of injunction.

The Court: Now I am confused. Your opponent says that [746] this was a cause of action.

Mr. Phelps: No, that is where he is mistaken.

The Court: If it isn't a cause of action, I don't see what kind of a motion or what kind of an order I can make.

Mr. Phelps: It is not separately stated and it is not a cause of action.

The Court: You are alleging that as part of your cause of action?

Mr. Phelps: Part of our cause of action.

The Court: With respect to your claim for damages?

Mr. Phelps: With respect to the claim for equitable relief.

The Court: As one of the considerations the Court should take into account in making an equitable decree?

Mr. Phelps: Yes, your Honor.

Mr. Rank: It doesn't appear that way in the complaint. It is set forth in Paragraph XVIII. Paragraph XVIII is exclusively an allegation of this agreement between people who are not parties to this complaint, as we understand.

The Court: It is a paragraph of the complaint; it isn't a separate claim.

Mr. Rank: It is a separate claim. It just appears as being an entirely separate and distinct point.

The Court: What are you asking? To strike that from the complaint? [747]

Mr. Rank: No, my motion is for a dismissal as to that claim under the rules. In other words, we are entitled to move for a dismissal of any claim.

The Court: What you are saying, Mr. Rank, is that you want to exclude a certain phase of the matter and certain factual matter—you want to exclude that from the consideration of the Court in determining what relief should be granted. That is what you are really saying.

Mr. Rank: Maybe we should do this: We also move to strike that from the pleadings and any testimony on that matter.

The Court: I think that the only question is as to whether those circumstances have relevancy in the relationship of the parties with respect to a decree that may be rendered. In other words——

Mr. Rank: Well, the Court would have to find existence of an agreement between Ward and Sage.

The Court: I don't think so. I think, for ex-

ample, if the Court restored the Union people to this contract, the Court would restore them the way they were, whatever the relationship was between the parties. I don't think I can make a new contract.

Mr. Rank: No, that is what I say. If the Court did not restore them, then the Court could possibly—I mean it is a possibility—hold—and this is what they of course are [748] striving for—hold that there was in fact an agreement and as a result of that agreement with the owners of the property to the east, if they are entitled to the benefit of that agreement, could use the lands contrary to that agreement.

The Court: In other words, they will suffer a damage because of their inability to properly work the other properties that they have?

Mr. Rank: Well, not necessarily. There may be other ways of getting out. But as far as our lands are concerned, the point is that they are endeavoring to establish an agreement between somebody else, and my motion to strike or motion to dismiss is based upon the fact that there is no proof of the existence of an agreement.

The Court: I can't make an agreement between the parties if there wasn't one.

Mr. Rank: That is exactly the point; but you would have to find, to hold, in fact that there was an agreement between Blue Creek and Sage. The point of my motion is that the testimony shows that there was no agreement, both Mr. Ward and Mr. Holter

testified there wasn't, and there are no documents supporting any other holding. I don't have to meet that.

The Court: There is a more practical aspect in that. Apparently, as I have heard so far—I haven't heard all of the testimony—there was a comity of interest there, and if, [749] in fact, as a result of this breach your clients were to use the fact that there was not a legal binding contracts as a means of changing the situation, the practical situation there that theretofore existed in comity, into one that would be disadvantageous to the other side, I would say that would be an equitable consideration that would weigh against your clients. Do I make myself clear?

Mr. Rank: I really don't follow that.

The Court: If the facts indicate that it isn't a legal binding agreement as such and your clients did act in relationship that was the same as if there were a legally binding agreement, and then thereafter on the basis of the taking back of the property on this default, your clients were now to urge that plaintiffs should be deprived of the rights that theretofore the parties had more or less recognized because there wasn't a binding legal agreement between the parties, that would have an equitable aspect to it.

Mr. Rank: Well there would have to be a showing that that was the idea between the parties.

The Court: Of course I don't know whether that is going to be urged. It depends upon what posture the case finally finds itself in.

Mr. Rank: You see at the time——

The Court: Well, they were doing it——

Mr. Rank: No. [750]

The Court: They were acting as if there was an agreement.

Mr. Rank: No. At no time, because there was never any logging operations——

The Court: They went over the Ward land.

Mr. Rank: No. There was never any operations in there until it all came under one ownership, namely the Wilson interests, and prior to that there was never any operation, so never any use of the road.

The Court: Both Sage and Ward, when it did come into the Wilson hands, there was an acquiescence in that use being made.

Mr. Rank: They had nothing to do with it, because Wilson, by the terms of his contract with Sage and the terms of his contract with Ward, had the right to use the Sage lands in the Ward contract, and the Ward lands in the Sage contract. There was no acquiescence between Sage and Ward.

The Court: I don't see how that can be determined now, until the whole case is submitted. It may be an element in the case, and it may not; depending upon the position of the case when it is finally submitted. When you argue it, and when it comes time to make the decision, it is time enough to decide what the relationship of that matter is to the case.

Mr. Rank: Your Honor, with that, I suggest that

we take the noon recess and then we will start to put in testimony [751] after the recess.

The Court: Offhand, I don't see any validity to the claim for damages, if there was a default.

Mr. Rank: The default, of course, is admitted. There is no issue, on the question of the default.

Mr. Phelps: The point is, if your Honor please—and it seems to have been lost in the shuffle—that the default is admitted, but the right to terminate has been denied and is denied and will become apparent not only on the basis of equitable grounds but also on the basis of legal grounds that will appear from this evidence and that we will urge upon your Honor at the proper time.

The Court: You are claiming that, while the default is admitted, the circumstances of the default were not such as to warrant the forfeiture and termination of the contract?

Mr. Phelps: We will go beyond that, if your Honor please. We contend, first of all, with respect to that, there wasn't a demand for performance of these amounts as is required under the contract, upon which to bottom a right to terminate. We also contend that there are other legal grounds which will appear before we reach the equity side of the Court, such as waiver and estoppel, in law to the right to terminate the contract. But those matters are all matters that we will argue to your Honor.

The Court: Yes. [752]

Mr. Phelps: They are matters of law: they are not matters of fact that we can at this time decide.

The Court: All the motions of Mr. Rank will be submitted.

How long do you anticipate you are going to take? It isn't very fair for me to ask you that question because Mr. Phelps has had, of course, a long time, I hope you are not going to tell me you are going to take as long as he did.

Mr. Phelps: No; he says not.

Mr. Rank: We do not have much. We will finish——

The Court: A great deal of the matter has already been covered.

Mr. Rank: We will finish tomorrow. We cannot finish this afternoon, but we should finish tomorrow morning without any trouble; and I think in view of the circumstance of the length of time we have been here, that is pretty reasonable.

The Court: We will resume at 2:00 o'clock.

(Whereupon, an adjournment was taken until the hour of 2:00 o'clock p.m., this date.)

November 30, 1954, at 2:00 P.M.

Mr. Rank: If the Court please, we would like to offer at this time, of which a copy has been furnished to counsel, the blanket assignment of all the assets of Blue Creek to the various individuals.

The Court: Any question about it?

Mr. Phelps: No; no question about it.

The Court. What do you need it in the record for? I am just thinking of you gentlemen, in case

the case proceeds further, you will have an enormous record.

Mr. Rank: I appreciate that.

The Court. Of documents that really have no importance in the matter, when there is no dispute about it.

Mr. Rank: There is a stipulation, is there counsel, that upon dissolution, all of the assets of the Blue Creek Redwood Company were transferred to the various parties defendant?

Mr. Phelps: If you assure me of that—I know of no information to the contrary—I will accept your statement.

Mr. Rank: If the Court please, two minutes ago I had a certified copy of our certificate of dissolution, which should be offered next.

The Court: The certificate of dissolution of what?

Mr. Rank: Of the Blue Creek Redwood Company. If we may [754] just pass that for a moment, and I will obtain it.

We would also like to have marked in evidence, as Defendant's Exhibit A, letters testamentary to Harold L. Ward as Executor of the Estate of Virginia Palmer Ward.

Mr. Phelps: No objection.

The Clerk: That is Defendant's Exhibit A, as marked in the pretrial conference.

(Thereupon, document previously marked Defendant's Exhibit A in pretrial conference, was received into evidence.)

Mr. Rank: These are all pretrial exhibits.

The Court: What number did it have on pre-trial?

Mr. Rank: A.

Pretrial Defendant's Exhibit B, letters of guardianship for Ann Ward.

The Clerk: Defendant's Exhibit B, introduced and filed into evidence.

(Thereupon, document previously marked Defendant's Exhibit B in pretrial conference, was received into evidence.)

Mr. Rank: There was an order made in the pre-trial conference, substituting Harold L. Ward as executor of the Estate of Virginia Palmer Ward, and a like order made in the case of Ann Ward as Guardian. Is it necessary to have a new order at this time? [755]

The Court: No. If an order was made, that is the end of it.

Mr. Rank: As Exhibit D, a certified copy of a grant deed—unless there is question about whether this property was transferred to these individuals. Will it be so stipulated?

Mr. Phelps: Put it into evidence. I am sure you will establish that.

The Court: All right.

The Clerk: Defendant's Exhibit D, introduced and filed into evidence.

(Thereupon, document previously marked

Defendant's Exhibit D in pretrial conference, was received into evidence.)

Mr. Rank: An original of the Power of Attorney, a copy of which has been provided counsel, as E.

The Clerk: Defendant's Exhibit E, introduced and filed in evidence.

(Thereupon, document previously marked Defendant's Exhibit E in pretrial, was received into evidence.)

The Court: That is to Ward and Strong. Is that correct?

Mr. Rank: Yes; to Ward and Strong.

True and correct copies of the Notice of Default and Notice of Termination, which were attached to the amended complaint, as one exhibit. It is Defendant's G.

The Clerk: Defendant's Exhibit G, introduced and filed [756] into evidence.

(Thereupon, document marked Defendant's Exhibit G in pretrial conference, received in evidence.)

Mr. Phelps: May I just see what that is? I think these are already in evidence.

Mr. Rank: I don't know whether they are all or as one exhibit. They may be, but I think we might as well mark them.

The original ratification by all of the co-owners other than Harold Ward of certain acts as Defendant's Exhibit K.

The Clerk: Defendant's Exhibit K introduced and filed into evidence.

(Thereupon, document previously marked Defendant's Exhibit K in pretrial conference, was received into evidence.)

Mr. Rank: Original ratification of Ann Ward and Harold L. Ward as her guardian of all of the acts contained therein.

The Clerk: Defendant's Exhibit L, introduced and filed into evidence.

(Thereupon, document previously marked Defendant's Exhibit L in pretrial conference, was received into evidence.)

Mr. Rank: A certified copy of the petition of Harold L. Ward as guardian, and Ann Ward, for the approval by the Probate Court of the County of Oakland, State of Michigan, together with a certified copy of an order approving the [757] ratification.

The Clerk: That is Defendant's Exhibit M, introduced and filed into evidence.

(Thereupon, document previously marked Defendant's Exhibit M in pretrial conference, was received into evidence.)

Mr. Rank: And a certified copy of the order of the Superior Court of the State of California, in and for the County of Humboldt, also approving the ratification.

The Clerk: That is Defendant's Exhibit N, introduced and filed into evidence.

(Thereupon, document previously marked Defendant's Exhibit N in pretrial conference, was received into evidence.)

Mr. Rank: Mr. Fletcher, will you take the stand, please?

LAWRENCE S. FLETCHER

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court, sir.

The Witness: Lawrence S. Fletcher.

Direct Examination

By Mr. Rank:

Q. Mr. Fletcher, you are an attorney at law, are you? [758] A. I am.

Q. Having your office in Oakland, California?

A. I do.

Q. Licensed to practice in the State of California? A. I am.

Q. What is the name of your firm?

A. The present name?

Q. The present name.

A. The present name is Hardin, Fletcher, Cook & Hayes.

Q. You have been attorney for the Ward interests on the West Coast since about 1943 or '44?

(Testimony of Lawrence S. Fletcher.)

A. In January, about, '44.

Q. And what was the firm name at that time?

A. Hardin, Rank, Melsor & Fletcher.

Q. Mr. Melsor has since deceased and Mr. Rank is no longer a member?

A. Yes. Leonard Melsor died in '47, and in '49 we changed our name when Mr. Rank left the firm.

Q. Did you have occasion during the early spring of 1950, to visit the office of Coast Redwood at Arcata, California? A. I did.

Q. And while there at that time who did you see and what did you do?

Mr. Phelps: This is the spring of '50?

Mr. Rank: '50, yes. [759]

A. I went to see——

Mr. Phelps: I can't see the materiality at this point.

Mr. Rank: Nobody can tell its materiality until it is in.

The Court: What is the date?

Mr. Phelps: The spring of '50.

Mr. Rank: I think the Court will realize the materiality. I can explain it if the Court desires.

The Court: This is the office of whom?

Mr. Rank: Of Coast Redwood.

Q. At that time who was in charge of the office?

A. Paul Owens.

Q. Did you have a conversation with Mr. Owens?

A. Yes.

Q. Will you relate the conversation, please?

Mr. Phelps: Just a moment. I will object to that,

(Testimony of Lawrence S. Fletcher.)

if your Honor please, without foundation and hearsay.

The Court: It is pretty remote. What is the purpose of it?

Mr. Rank: Withdraw the question.

Q. (By Mr. Rank): While you were there did you make a study of the method employed by Paul Owens at that time of keeping the stumpage records for Coast Redwood? A. I did.

Q. And did you have a conversation with him at that time concerning it? [760]

A. Yes; I did.

Q. And what——

Mr. Phelps: Go ahead. Next question.

Q. (By Mr. Rank): What discussion did you have so far as the method of keeping the books as to their being current or not?

Mr. Phelps: If your Honor please, I object to this. It was way back in '50.

Mr. Rank: Whether they were up to date.

The Court: Hasn't it been admitted that they kept stumpage records?

Mr. Phelps: Yes. There is no question about that.

Mr. Rank: Yes. But, if the Court please, Mr. Wilson's testimony was that they were always behind, always late; that is why he couldn't get out the reports. The information was never up to date, and so forth. And I think that Mr. Fletcher's purpose of making this visit was for that very purpose. In other words, to check the reason for the late

(Testimony of Lawrence S. Fletcher.)

reports. Mr. Wilson testified he could never get information out of Paul Owens; he was a good accountant but always late.

The Court: He is talking about 1950.

Mr. Rank: That is what Mr. Wilson was talking about and what Mr. Owens testimony was, and might still be continuing. I think those things are material.

Mr. Phelps: Well, it happened in 1950. It [761] wouldn't be material particularly on an isolated instance.

The testimony isn't quite as they state it. Sometimes they were current, and sometimes they were not; so I believe it is improper to go back to 1950.

The Court: I don't quite see the materiality, Mr. Rank; whether, on the particular occasion he went there what he found the condition to be.

Mr. Rank: Here is what we will offer to prove—offer to show: That at that time he discovered and found that the method of keeping the stumpage record was a method whereby the girl kept it daily; the day he was there the records were up to date, the day before, and that was their ordinary routine of keeping the records.

Now I am certainly not going to labor the point——

The Court: Suppose they did keep the records that way. That still is not material, is it, as to what the relationship between the accountant and the head of the company was as to getting information from him? He may have kept very good records.

(Testimony of Lawrence S. Fletcher.)

Mr. Rank: Well, in view of Mr. Wilson's testimony, that is the purpose of it. The correspondence later on shows that—but I certainly don't want to labor the point. We spend more time arguing about a thing and discussing it than putting it in.

The Court: I would say that 1950, on one occasion is [762] rather remote.

Mr. Rank: All right.

Q. (By Mr. Rank): Mr. Fletcher, at that time did you have a discussion with Mr. Owens concerning his instructions from Mr. Wilson as to when he should send the reports to the Wards—the monthly reports? A. Yes; I did.

Mr. Phelps: Same objection; remote, hearsay, without foundation.

Mr. Rank: The testimony has been that Mr. Wilson has always told him to send the reports in by the 20th as a routine matter. This conversation as to instructions that Mr. Wilson had given Mr. Owens, according to Mr. Owens' statement to Mr. Fletcher, may be material.

The Court: Well, let him answer that.

The Witness: I did.

Q. (By Mr. Rank): Relate the conversation, please?

Mr. Phelps: Does your Honor have in mind the hearsay objection there? At any rate, I just want to make the record show that I have made that objection.

The Witness: I discussed—

(Testimony of Lawrence S. Fletcher.)

The Court: Well, is this contrary to something that Owens said?

Mr. Rank: Yes.

The Court: I haven't got all the testimony in mind. [763]

Mr. Rank: Yes. It is contrary to something Mr. Owens said and something that Mr. Wilson said.

The Court: Well, something Mr. Wilson said, it wouldn't be——

Mr. Rank: I recall Mr. Owens testifying that Mr. Wilson told him to always get the reports out by the 20th of the month.

Mr. Phelps: I don't recall the testimony.

The Court: This is only cumulative then and corroborative, isn't it?

Mr. Phelps: I have an additional point to urge, if your Honor please: That the party here was the Union Bond & Trust Company, and the situation with respect to Union, not to Coast Redwood, as to which Mr. Owens at that time wasn't even keeping any records of any kind for Union in '50.

Mr. Rank: Well, but Mr. Wilson also testified that he instructed Owens——

The Court: I don't think there is much validity to that part. What Owens told the witness in 1950 as to what his instructions were——

Mr. Rank: If the Court please, let's withdraw the question.

The Court: ——doesn't seem to me to be very important.

Q. (By Mr. Rank): Mr. Fletcher, in the fall of

(Testimony of Lawrence S. Fletcher.)

1952 did you have various correspondence and conversation with Mr. Wilson and Mr. Wilson's attorneys with reference to the power of [764] attorney and the assignment of the contract?

A. I did.

Mr. Phelps: I have no objection to those documents. You can put them in without establishing a foundation from the witness.

Mr. Rank: If the Court please, I intend putting all of these letters and documents in as one exhibit, so I will hold these two letters.

The Court: Well, put them all in at one time, showing them to counsel to save time.

Mr. Phelps: Just show them to me.

Mr. Rank: Here they are (handing documents to counsel).

Mr. Phelps: May I see that first one once again? It ties in. Oh, you have them all here?

Mr. Rank: They are all here.

The Court: Mr. Rank, is there anything particular you want to bring out from the witness?

Mr. Rank: Yes.

The Court: Except that these documents passed between counsel?

Mr. Rank: There are some things to bring out.

The Court: You just call my attention to what you want in these documents.

Mr. Rank: I will do that, and also ask the witness questions concerning conversations. [765]

Mr. Phelps: I have examined all of them. They

(Testimony of Lawrence S. Fletcher.)

all may go in evidence if you wish. I have no objection to any of them.

The Court: All right.

Mr. Rank: Thank you. We will ask that they all be marked in evidence as Defendant's next in order.

The Clerk: That will be Defendant's Exhibit AG introduced and filed into evidence.

(Thereupon, document identified above was received in evidence and marked Defendant's Exhibit AG.)

Mr. Rank: The first two letters are under date of September 9, 1952, and are simply advising Mr. Wilson and the Union Bond & Trust Company of the fact that the assignment of the contract and the fact of the appointment of Mr. Ward and Mr. Strong as attorneys in fact.

Now, then, the next letter is a letter dated September 22, from Mr. Ward to Mr. Wilson, to the effect that a letter had been received but still addressed to Blue Creek Redwood Company, and calling attention that they should be addressed to Ward and Strong as attorneys in fact.

Next is a letter dated November 25, 1952, addressed to Blue Creek Redwood Company, signed Union Bond & Trust Company, enclosing a check for \$26,000.00 for logs for the months of May, June, July and August. [766]

Q. (By Mr. Rank): Now, Mr. Fletcher, do you recall being advised of the receipt of that check by Mr. Ward's office? A. Yes.

(Testimony of Lawrence S. Fletcher.)

Q. And did you give instructions as to what should be done—and those instructions were carried out by Miss Brownley's returning the check to Mr. Wilson, as is shown in the wire of November 29, 1952, is that correct?

Mr. Phelps: Doesn't the matter speak for itself?

A. Yes.

Mr. Rank: Yes; it does, but——

Q. (By Mr. Rank): Then what was the next that happened insofar as this matter was concerned, Mr. Fletcher, if you recall?

A. On the morning of December 1st, which was a Monday, I had been over in court in Martinez, my father-in-law's estate; and on my return to the office——

Mr. Phelps: This is '52, is it?

Mr. Rank: Yes; December, '52.

A. (Continuing): '52. On my return to the office I had on my desk a copy of the telegram dated December 29 addressed to A. K. Wilson, signed by Gladys Brownley, stating that they were returning the check in the amount of \$26,188.94, on the basis that it was made out to Blue Creek Redwood Company, not to Harold L. Ward and Frederick Strong, Jr., as attorneys of fact. Along with the copy of a telegram that Mr. A. K. Wilson of the Union Bond & Trust Company had sent to Blue Creek Redwood Company, [767] Harold L. Ward and Frederick S. Strong, Jr., and Harold L. Ward—all three names used—which is a very long telegram, stating the

(Testimony of Lawrence S. Fletcher.)

reasons why the check had been made payable to the Blue Creek Redwood Company.

Q. Mr. Fletcher, May I——

Mr. Phelps: I don't want to interrupt you, but doesn't it all speak for itself? He is just reading from the document. If there is anything particular, put it in evidence.

Mr. Rank: If the Court please, I think I should advise the Court that this is evidence tending to support our affirmative defense of estoppel, equitable estoppel as to the questioning of the validity of the assignment or the power of attorney or the—that is the purpose of this testimony.

The Court: The what?

Mr. Rank: They have questioned, there has been questioned the authority, that is, the right of the assignment; the right to assign the contract of the individuals and also the acts done and performed by Ward and Strong under the power of attorney. They have questioned the validity of those acts.

The Court: Are you still questioning that, Mr. Phelps?

Mr. Phelps: If your Honor please, I am perfectly willing to submit it on these documents. The point on that is simply this: That at all times they have taken the position that the contract was not partially assigned and we have reserved our [768] rights under the contract. I will say this to your Honor. I think this will answer the question. So far as this law suit is concerned, I will make no issue of it; but so long as it is understood that I am not waiving any rights outside of those matters that

(Testimony of Lawrence S. Fletcher.)

are to be determined by your Honor in this lawsuit. If that is satisfactory.

But I mean, I don't want to waive the point that intercontractually between the parties. But so far as this lawsuit is concerned, I make no point of it.

Mr. Rank: And also will you make the same statement or stipulation as to the acts done by Ward and Strong under the power of attorney? For example, the sending of the default notices and the sending of notice of termination?

Mr. Phelps: Again, so far as this lawsuit is concerned, I will make no point, because of the partial assignment. I don't want to waive the point beyond this lawsuit, you understand, Mr. Rank.

Mr. Rank: Well, I understand.

Mr. Phelps: All right.

Mr. Rank: Now, do I understand correctly that—and it can be so stipulated—that there is no issue as to the validity of the assignment insofar as this lawsuit is concerned the validity of the assignment of Blue Creek Redwood Company to the various named individuals?

Mr. Phelps: Yes, Mr. Rank. Insofar as this lawsuit is [769] concerned, or insofar as any issue to be determined by this Court. Reserving, of course, our right to assert that in any other matters that may arise between the parties outside the issues of this court.

Mr. Rank: And is the same stipulation true as to the matters and things done, the validity of the power of attorney and the matters which, and things

(Testimony of Lawrence S. Fletcher.)

done under the power of attorney as to all the individuals named as defendants in the lawsuit—this lawsuit?

Mr. Phelps: I don't know that I understand your last statement, but if I do understand it, it would follow.

The Court: Are you going to attack in this lawsuit the various notices and acts of the men who acted under the power of attorney on the ground that they didn't have any authority to do that?

Mr. Phelps: Because of the assignment——

Mr. Rank: No, no, no, no; because of the power of attorney. In other words, let's face the issue. Are you going to attack the validity of the default notices and the validity of the notice of termination on the ground that Ann Ward was a minor?

Mr. Phelps: In the state of the record as it now stands, no, Mr. Rank. I think I can answer your question and the Court's question by answering that we make no issue in this lawsuit with respect to that matter. What I don't want to concede, and I don't think you meant for me to concede, that [770] the notices of default, so called, as such, were effective.

Mr. Rank: No. All I mean——

Mr. Phelps: You understand me?

Mr. Rank: All I am saying to you, and so the record will be perfectly clear on this, that there will be no issue in this lawsuit as to the validity of the notices of default, the validity of the power of attorney, the validity of the acts done under it, or

(Testimony of Lawrence S. Fletcher.)

the validity of the notice of termination, insofar as this lawsuit is concerned, at all. Well, let's so insofar as——

Mr. Phelps: I think you are going beyond——

The Court: I stated it to you. Now you are arguing about it. I asked Mr. Phelps if he was making any objection to these notices of default on the ground that the persons who gave them didn't have any authority to give them.

Mr. Phelps: And I said in this lawsuit I make no such issue.

The Court: All right. Doesn't that answer it?

Mr. Rank: That does it perfectly. Now, these letters were offered and marked in evidence, but in view of that stipulation, they are not necessary to be in evidence.

The Court: All right.

Mr. Phelps: Stipulate they may be withdrawn?

Mr. Rank: So it is stipulated they may be withdrawn and that number, AG, saved for some other exhibit. We will [771] just take them back.

The Clerk: AG withdrawn.

(Whereupon, Defendant's Exhibit AG was withdrawn.)

Mr. Rank: The next matter, if the Court please, has to do with the question of the payment of the 1950, '51 and '52 taxes, and Mr. Wilson's excuse, that he thought he was paying the '53 and '54 taxes when he paid that payment. I shouldn't use the word "excuse"—"reason."

(Testimony of Lawrence S. Fletcher.)

The Court: Those taxes have since been paid?

Mr. Rank: Beg pardon?

The Court: The taxes have since been paid?

Mr. Rank: The '53 and '54 have not been paid.

Mr. Phelps: But the '50, '51 and '52 have been paid.

Mr. Rank: Yes; have been paid.

(Documents examined and conversation between counsel out of hearing of the Reporter.)

Mr. Phelps: Mr. Rank has handed me a sheaf of papers and I have examined them, if your Honor please. I don't see the materiality, and on that ground reserve the objection, while I have no objection as to the foundation, as to those—correspondence between Fletcher, Cook & Hayes, and Mr. Wilson, or between the Wards and Wilson. But there are included and bound into this some other correspondence between Fletcher, Cook & Hayes, and the Tax Collector and the State, and some other unnamed persons, and as to that I would certainly object to [772] that as hearsay and not binding on the plaintiff. If you will eliminate those——

Mr. Rank: When it comes to those, why——

Q. (By Mr. Rank): Mr. Fletcher, I hand you a group of letters and copies and ask you if on December 12, 1952, you wrote the letter appearing at the top of the group. A. I did.

Q. Yes. And that letter reads as follows:

“In accordance with the Blue Creek contract with you, dated May 1, 1946, Paragraph IV

(Testimony of Lawrence S. Fletcher.)

provides that you are to pay all the current taxes on this property and shall mail either the tax receipt or photostatic copy showing payment.

“Would you kindly let me know immediately whether or not these taxes have been paid, and if so, mail the photostatic copy of the receipted bill to this office.

“Very sincerely yours,”

Now, did you receive a reply to that letter?

Mr. Phelps: Well, I am going to object to this. This has to do with taxes which were since paid. That is my——

Mr. Rank: Well, if the Court wants an expression from me, I will state it. But this is all part of the whole picture. Mr. Wilson testified that when he paid the \$12,000.00 in December, he thought he was paying—for '53 and '54, and I think the [773] event leading up to the payment of that and the fact it was called to Mr. Wilson's attention, and all those matters, are material.

Q. (By Mr. Rank): Now, did you receive a reply to that letter, Mr. Fletcher? A. No.

Q. Did you then write to the Tax Collector at the courthouse in Eureka to find out whether or not those taxes had been paid? A. I did.

Q. And a copy of your letter is——

Mr. Phelps: I will object to that letter as hearsay and addressed to a third person, self-serving as far

(Testimony of Lawrence S. Fletcher.)

as Mr. Fletcher is concerned, and not binding on the company.

The Court: Well, was that subsequently communicated to Mr. Wilson?

Mr. Rank: Yes, it was subsequently, or the fact they had not been paid was subsequently communicated.

The Court: Well, then, can't you cover that by the subsequent letter?

Mr. Rank: Well, if the Court please, I am trying to do this orderly, before—to bring the whole picture out. In other words, Mr. Wilson didn't reply to his letters, so he wrote to the Tax Collector to find out——

The Court: Well, can't you establish, can't you just ask the witness whether, if he didn't receive any reply, whether [774] he took the matter up with the Tax Collector? And then, after he took the matter up with the Tax Collector, did he communicate further with Mr. Wilson? What did he communicate? And then you save those objections.

Mr. Rank: All right.

Q. (By Mr. Rank): Mr. Fletcher, assume—Well, did you, after receiving no reply from that letter, did you communicate with the Tax Collector?

A. I did.

Q. And then thereafter did you communicate with Mr. Wilson or talk with him on the telephone?

A. No. I talked with Mr. Ward.

Q. Did you receive on March 22, 1953, a wire from Mr. Wilson as contained in the exhibit, a copy

(Testimony of Lawrence S. Fletcher.)

of the wire directed to Harold Ward and Frederick Strong, "Payment of delinquent taxes being made, will be sent copy receipted tax payment"?"

A. I received a copy of that telegram from Mr. Wilson.

Q. Yes. Now, did you receive any receipted tax papers? A. No.

Q. Or copies? A. No.

Q. Did you thereafter communicate with the Tax Collector to ascertain whether or not the taxes had been paid? A. Yes.

Q. And received a reply? [775] A. Yes.

Mr. Rank: Now, if the Court please, I believe this reply is material. It is simply a letter stating that the first installment had been paid and the second had not been paid, and I think it becomes material as this tale unfolds——

The Court: You mean under the records——

Mr. Rank: The business records.

The Court: That provision of the Federal Code that if this is an official communication from the Tax Collector, it is admissible?

Mr. Rank: That's correct.

Mr. Phelps: Well, submitted, your Honor.

The Court: I think I would admit it on that theory.

Mr. Phelps: Submit the objection that it is hearsay.

The Court: All right.

Q. (By Mr. Rank): On April 8th, you received

(Testimony of Lawrence S. Fletcher.)

a reply from the Tax Collector of Humboldt County, did you not?

A. That's correct, Wallace E. Martin.

Q. And a copy of which is included in this group of letters and in which you were advised that the first installment of '53 taxes had been paid but the second installment had not been paid?

A. That's correct.

Q. Did you communicate that fact to Mr. Wilson?

A. Yes, On April 13th I wrote Mr. Wilson a letter. [776]

Q. And advised him that on April 20th the second installment of taxes would become delinquent?

A. That's correct.

Mr. Phelps: Let's establish the year of that, because it is important.

The Witness: April 13, 1953.

Mr. Phelps: '54; which is it?

The Witness: '53.

Mr. Phelps: '53 and this is which taxes now?

Mr. Rank: These are the——

The Court: The second installment?

The Witness: Second installment of 1952-53.

Mr. Phelps: All right.

Q. (By Mr. Rank): At that time, Mr. Fletcher, had you had any information or advice or knowledge that any prior taxes were unpaid? A. No.

Q. So you communicated with Mr. Wilson and told him that the second installment of the '52-53 taxes would be delinquent April 20th?

(Testimony of Lawrence S. Fletcher.)

A. That's correct. [777]

Q. And you received a reply to that letter, did you?

A. On April 24th.

Q. Just read that letter.

A. It is addressed to Mr. Lawrence Fletcher, care of office address:

“Dear Larry:

“Received your letter of April 13 regarding taxes in Humboldt County. In answer will say that these taxes will be paid shortly. Union Bond and Trust Co., A. K. Wilson. Carbon copy to Harold Ward, and carbon copy to Dunne, Dunne and Phelps.”

Q. Now, what was the next that you heard from Union Bond and Trust or Coast Redwood?

A. On July 8th I received a registered letter from Paul Owens in which he enclosed a certified check for \$4,331.69 and the letter is addressed to me and it starts out:

“Dear Larry:

“Pursuant to instructions from A. K. Wilson, we are herewith enclosing our certified check, No. 16598 in the amount of \$4,331.69, making the same payable to the Auditor of Humboldt County.

“With personal regards from this writer, we are, very truly yours,

“PAUL C. OWENS.”

(Testimony of Lawrence S. Fletcher.)

And it is on the Coast Redwood Company [778] stationery.

On July——

Q. Just a moment, Mr. Fletcher, please.

A. Oh.

Q. I show you Defendant's Exhibit Y for identification and ask you if that is a photostatic copy of that letter? A. That is. I made that myself.

Q. That photostat? A. M-hm.

Mr. Rank: We will ask that that be marked in evidence as Defendant's Y.

The Court: Defendant's Y?

Mr. Rank: Yes. That's the cashier's check by Coast Redwood.

The Clerk: Defendant's Exhibit Y admitted into evidence.

(Whereupon, Defendant's Exhibit Y for identification only was received in evidence.)

Q. (By Mr. Rank): And on July 17th, you returned the check to——

A. To the Coast Redwood Company.

Q. In accordance with your letter of July 17th.

A. July 17th.

Q. Then did you hear from Mr. Wilson about that?

Mr. Phelps: Now you are not giving the whole story. You are just picking out what you want to pick out. Well, never mind; go ahead. [779]

The Witness: Well, the letters speak for themselves.

Mr. Phelps: All right; that's why I objected to

(Testimony of Lawrence S. Fletcher.)

your testifying as to part of the letters. The letters are in evidence, they do speak for themselves.

Mr. Rank: I don't think that I am omitting anything that is material, and if there is anything else, you can certainly——

Mr. Phelps: Go ahead.

Q. (By Mr. Rank): Now, on July 20th you received a reply from Mr. Wilson, did you not?

A. I did.

Q. The letter reading as follows:

“Dear Larry:

“Understand you returned the certified check * * *”

A. Yes; it is almost a two-page letter.

Q. And just summarizing the letter, it states that they were short of funds and unable to make the tax payment, would like to have you hold the check so they could be sure the money would be paid, in the meantime that they were going to endeavor to get the taxes reduced; I believe that's covered in the letter? A. That is correct.

Q. And now at that time did you have any knowledge or information that any taxes were unpaid other than the 1952-53 taxes?

A. No; I did not. [780]

Q. And the next letter is the return of that check to you, is that correct?

A. That's correct; the original certified check.

Q. And following that, on July 24th, you sent a letter to Mr. Wilson to the effect that you would

(Testimony of Lawrence S. Fletcher.)

hold the check under the circumstances and under the conditions set forth in the letter?

A. Yes. I would call Mr. Mills and explain my position to Mr. Mills and said, in view of that, that I would hold the check under certain circumstances, and so I outlined the circumstances to Mr. Wilson and sent Mr. Mills a copy of it.

Q. And the following letter, dated August 1st—

A. Was accepting my conditions and asked me to hold the checks.

Q. And they then sent you a check for \$100 to cover interest and delinquency or penalties?

A. That's correct.

Q. Now when was the first time that you received any information or knowledge as to the fact that there were other unpaid taxes on the property other than the second installment of '53?

A. When I received a letter from the State Controller's office on October 8, 1953.

Q. Now Mr. Fletcher, before you testify concerning that letter, did you then send a copy of that letter to Mr. Wilson? [781]

A. It is my recollection that I did.

Q. And did you have a telephone call with Mr. Wilson?

A. Yes, I called Mr. Wilson in this regard.

Mr. Rank: Now this letter, if the Court please, reads as follows, from the Controller—

Mr. Phelps: We may have the same objection; incompetent, irrelevant and immaterial.

(Testimony of Lawrence S. Fletcher.)

Mr. Rank: Same offer.

Mr. Phelps: Hearsay, no proper foundation.

The Court: Admitted under the Public Records Section.

Mr. Phelps: It has no bearing, your Honor.

The Court: The public Records Section of the Code.

Mr. Phelps: But again I fail to see, the taxes were paid, they are not in default at the present time, they were paid, so anything that would come up out of this would be waived by the parties. I just don't see why we want to go into all this and waste time.

Mr. Rank: We are trying to show, Mr. Phelps——

The Court: You mean that these taxes that they are talking about here have been paid?

Mr. Phelps: Yes.

Mr. Rank: Oh, surely they were paid.

Mr. Phelps: And I made that objection earlier and saw no——

The Court: When were they paid? [782]

Mr. Rank: These were paid, if I might state, these were the ones that were paid in December.

The Court: '53?

Mr. Rank: By the Coast Redwood check of twelve or thirteen thousand dollars, and Mr. Wilson testified that he thought constituted the payment for the taxes that are now in default. Now the purpose of this is to show the correspondence, the communi-

(Testimony of Lawrence S. Fletcher.)

cations with him, and endeavor to show, if the Court please, how ridiculous such claim is.

The Court: Well, what's the importance of it, if they were paid?

Mr. Rank: The importance is just this, Mr. Wilson has given an excuse, as an excuse——

The Court: Well, I know, but I am not here to discipline anybody. It's moot, isn't it?

Mr. Rank: No, no, it is not moot.

The Court: Well, you wouldn't expect that you would take back the property for that reason in April of the following year?

Mr. Rank: No, I think the Court misunderstands.

The Court: Maybe I do, I don't know.

Mr. Rank: One of the defaults with which they are charged and—is failure to correct in sixty days, the failure to pay the first installment of '53-54 taxes.

Mr. Phelps: Let's get to that. [783]

Mr. Rank: Mr. Wilson has testified as his sole and only excuse for failure to pay it, was that he thought when he paid the tax bill in December, he was paying those taxes. Now we are showing the correspondence, the conversations leading up to that payment, which would indicate that such a statement on his part is beyond belief, let's say. Now that's the purpose of this, and it is certainly material in meeting their claim that that is their excuse.

The Court: Your point is that you, speaking

(Testimony of Lawrence S. Fletcher.)

colloquially—he knew exactly what he was paying at the time he was paying it?

Mr. Rank: Why certainly, because——

The Court: Because there is correspondence showing it?

Mr. Rank: That's correct.

The Court: Well, I think on that theory it would be admissible.

Mr. Rank: This letter of October 8, 1953, from the Controller from the State of California direct to Frederick Strong, care of Hardin, Fletcher, Cooke and Hayes, is as follows:

“The records of this office show that the above-described property has been sold to the State for delinquent taxes.

“Since this is timberland, we wish to call to your attention the provisions of Section 3441 of the [784] Revenue and Taxation Code which makes it unlawful for anyone to cut and remove timber from tax sold land and subjects a violator to prosecution and suit for damages.

“Before it is legal to cut on any of this land, a full and complete redemption must be made. The County Auditor will, upon request, furnish you an estimate of the amount necessary to redeem, which amount must be paid before the lien of taxes against this land is removed for the years 1950-51-52.

“When redemption has been made, kindly notify this office so we may clear our records. If any of this property has been sold, please let us have the name and address of the new owner. It is necessary

(Testimony of Lawrence S. Fletcher.)

as well as a legal requirement that a statement be filed each year with the Assessor as to the status of the property. If any timber has been cut, this must be reported so the Assessor can reduce the assessment accordingly.

“Your cooperation in this matter is much desired.

“Very truly yours, Robert C. Kirkwood, State Controller.”

Mr. Rank: Now as I understand your testimony, you sent a copy of that letter to Mr. Wilson and also called him about it? [785]

A. That's right, yes.

Mr. Phelps: He said he thought he did.

The Witness: I think I did. I did call him on the telephone, though; that I know.

Q. (By Mr. Rank): Upon receiving that?

A. Yes.

Q. And what was your conversation with him? Please relate it.

A. Well, this was the first knowledge that I had had that there was any delinquent taxes, and outside the second installment of 1952-53. And it came as a great shock, so I got on the telephone and called Mr. Wilson and bawled him out in no uncertain terms and said that, in the course of the conversation, told him that I thought we had been, I had been misled in accepting that check for the last part of 1952-53 when he still owed his 1951, and the second half of 1952. I told him that he was guilty of a criminal offense in cutting any further timber in accordance with the Revenue and Taxation Code,

(Testimony of Lawrence S. Fletcher.)

with which I was very familiar, since I had handled tax deeded lands in the Attorney General's office some years before. I told him——

Mr. Phelps: Well, I think the witness' opinion and what he said with respect to that should go out, if your Honor please.

The Witness (Continuing): I also told [786] him——

The Court: Yes, the opinion may go out.

Mr. Rank: Well, I think——

Q. (By Mr. Rank): Are you relating your conversation?

A. I am relating my conversation with Mr. Wilson.

Mr. Phelps: That doesn't make it all admissible, just because it is a conversation, if your Honor please.

Mr. Rank: Why not?

Mr. Phelps: Why, I submit that it isn't. He may have an opinion and conclusion, that doesn't make everything he says——

The Court: What did Wilson say?

The Witness: Mr. Wilson said, and I asked him the direct question why he had not paid them. He said, well, he was just short of money and that he would try to pay them.

And I said, well, that I felt that we had been misled and that in view of this state of the record, I would probably return the certified check and he would receive a notice of default. I also asked him on that occasion why we had not received the log slips for the prior months and a log report, as

(Testimony of Lawrence S. Fletcher.)

we had been waiting for this whole period of time, about five months, from June on, for these pink slips and the log reports, and he said that he understood that Mr. Owens had mailed them and I said, "Well, we have never received them."

Mr. Rank: Is that about the extent of the conversation?

A. That is the substance of the conversation. I followed it [787] up two days later with a letter.

Q. Yes. And in the meantime did you obtain from the auditor of Humboldt County a statement, a bill and a statement, showing the items making up the amount then due?

A. I did. I wrote, either wrote or telephoned to the auditor and asked her to send me down a complete statement of the delinquent taxes that are due.

Q. And did you forward those to Mr. Wilson?

A. I did.

Q. And then you also sent him a letter, or did send him a letter under date of October 15th?

A. I did.

Q. Addressed to Mr. A. K. Wilson, signed Lawrence Fletcher?

A. I did. [788]

Mr. Rank: Stating as follows:

"Confirming my telephone conversation with you of October 13, 1953, we were shocked when we received the notice from the office of the State Controller, Division of Tax Deeded Lands, at 1033 Eye Street, Eureka, that the properties covered by the Blue Creek Contract had been sold for delinquent taxes for the years 1950 and 1951.

(Testimony of Lawrence S. Fletcher.)

“Why you have not paid these taxes in accordance with the terms of Paragraph 4 of our Agreement, we fail to understand. I talked with Mr. Ward concerning this matter and you will undoubtedly receive a default covering these taxes.

“We are aware of your failure to have paid the 1952 taxes. In accordance with our previous understanding, the \$4,331.69 cashier's check, made payable to the Auditor of Humboldt County, dated July 2, 1953, and the cashier's check dated July 27, 1953, in the amount of \$100.00, were to have been applied on the 1952 taxes. How you arrived at these amounts, in the light of the taxes now due as set forth on the statement received from the auditor of Humboldt county, we do not understand. The taxes for 1952 now delinquent only total \$3,177.31.

“In accordance with the statement from the [789] county auditor, you owe at the present time, \$12,297.16. If this \$4,431.69 which I now have in my possession is deducted therefrom, you will be required to pay \$7,865.47 to clear up all delinquencies. You will note that the additional interests and penalties will accrue after October 29, 1953, and a new statement should be obtained from Nell M. Dick, the county auditor.

“If you will let me know where to send the two cashier's checks in order that the same may be applied on the back taxes, I will comply with your request.

“In the meantime, however, we must insist that

(Testimony of Lawrence S. Fletcher.)

these taxes be paid in accordance with the terms of the contract.”

Q. (By Mr. Rank): Did you receive a reply to that letter, Mr. Fletcher, to your recollection?

A. No, I did not.

Q. On October 19th, you followed with another letter, did you not? A. That is correct.

Q. And that letter is directed to Mr. Wilson, and signed by you? A. That is correct.

Mr. Rank: (Reading). [790]

“Dear Art:

“We have been giving serious consideration to the problem raised by your failure to have paid the 1950, 1951 and 1952 real property taxes upon the lands covered by the Blue Creek Redwood Company contract.

“When we accepted possession of the certified check of the Coast Redwood Company dated July 2, 1953, in the amount of \$4,331.69 on July 24, 1953, and the \$100.00 cashier’s check upon the Security First National Bank, dated July 27, 1953, we were not aware you had failed to pay the taxes for the two prior years. These two checks, we understood, were to apply upon your 1952 delinquency, alone.

“In accordance with our understanding as set forth in my letter of July 24, 1953, we are now returning to you the two checks referred to in order that you can apply the same upon the delinquent taxes. Likewise, Mr. Ward is mailing you a default notice for your failure to have paid these taxes for the past three year period.

(Testimony of Lawrence S. Fletcher.)

I sincerely hope you will see to it that all these delinquent taxes are paid promptly since you are now in violation of the criminal provisions of Section 3441 of the Revenue and Taxation Code [791] by presently cutting timber from tax deeded lands.

If you will reread my letter of October 15, 1953, addressed to you, you will note that there is \$12,297.16 due for delinquent taxes at the present time, but that additional interest and penalties will accrue after October 29, 1953. [792]

Q. (By Mr. Rank): A default notice was sent on October 19th?

A. I received a copy of Mr. Ward's default notice of October 19th.

Mr. Rank: Now if the Court please, I see that attached to Defendant's Exhibit Z that was marked in evidence yesterday as a letter and a photostatic copy of a bill which should really not be a part of the exhibit; it should be an exhibit pertaining to the fifth 1953-54 taxes. So, with counsel's permission and the Court's, I would like to withdraw that and make that a separate exhibit.

Mr. Phelps: Take it out and let it be marked separately. No objection.

Mr. Rank: I am removing from that exhibit a letter dated October 29, 1953, which includes a 1953-54 tax bill which we will cover in a moment.

Q. (By Mr. Rank): Do you recall, Mr. Fletcher, while the Clerk is removing that, whether you had any further correspondence with Mr. Wilson on the matter of the payment of these 1951-52 taxes?

(Testimony of Lawrence S. Fletcher.)

A. I didn't have any correspondence; I had a telephone conversation with Mr. Mills.

Q. On what date, if you recall?

A. On December 29, 1953. As a matter of fact, I had two telephone conversations with Mr. Mills on that day

Q. Just a moment, Mr. Fletcher. What was the date of the [793] default notice?

A. December 19th.

Q. December 19th or October?

A. The default notice was October 19, 1953.

Q. And the 60-day period would elapse?

A. Would elapse either——

Mr. Phelps: It speaks for itself.

The Witness: Well, anyhow early——

Mr. Phelps: The Court is quite able to compute that 60 days. Why waste time on it.

The Court: That is the default notice about the taxes you are talking about?

Mr. Rank: Yes, it is the default notice for '50-51 and '52, and it is in the record dated October 19, 1953.

Q. (By Mr. Rank): Upon December 29th, you had a telephone conversation with Mr. Mills, did you? A. Yes.

Q. Will you relate the conversation?

A. I had telephoned to Mel Dick——

Q. Let's cover that first, Mr. Fletcher. I was a little ahead. Had you checked with the office of the auditor in Eureka to find out whether or not the taxes had been paid?

(Testimony of Lawrence S. Fletcher.)

A. Yes, I telephoned the office to inquire whether the 1950-51 and '52 taxes had been paid.

Q. Yes. [794]

A. And received a reply that they had not.

Q. And then what did you do?

A. Well, the twenty—the period of time had elapsed, the 60-day period had elapsed, so I called Mr. Mills and called his attention to that fact and that unless the taxes for the '50-51 and '52 were paid that we were prepared to terminate the contract. After talking with Mr. Mills—Mr. Mills said that he was sure that there must have been an oversight; that he would call Mr. Ward that same day and would call me back.

Q. Mr. Fletcher, you said Mr. Mills said he would call Mr. Ward?

A. Would call Mr. Wilson. In the meantime, I called Mr. Ward and advised Mr. Ward of the facts and later in the day, I don't recall whether Mr. Mills called me or I called Mr. Mills, but Mr. Mills, who had been in touch with Mr. Wilson said that the payments for the delinquent taxes for the 1950-51 and '52 was a pure oversight; that they would be paid, and he appreciated our calling that to his attention.

Q. Do you recall whether or not there was anything mentioned in either of those two conversations with Mr. Mills concerning the 1953-54 taxes?

A. I don't recall as to that.

Q. And was there any further conversation that day?

(Testimony of Lawrence S. Fletcher.)

A. No; but on the following day I did receive a copy of a [795] telegram to Mr. Ward.

Q. Reading:

“Taxes have been paid this date and photostatic copies of paid statements being mailed.

“(Signed) Union Bond & Trust Company.”

Is that correct? A. That is correct.

Q. The photostatic copies you received following are photostats of the receipt and the statement attached to Defendant’s Exhibit Z, is that correct?

A. Yes, these are copies of the photostats that we received.

Q. And you received these from——

A. Directly from—I don’t recall where they came from, but my recollection is that they came from Eureka or Arcata.

Mr. Rank: We will ask, if the Court please, that the letters and documents just referred to be marked and included in Defendant’s Exhibit Z.

Mr. Phelps: It is not necessary if they have been read.

Mr. Rank: We will ask——

Mr. Phelps: I have no objection except to those which I have already made the objection to and your Honor has already ruled upon the objection.

The Court: All right, put them in Exhibit Z.

(Whereupon, documents referred to were attached and made a part of Defendant’s Exhibit Z.) [796]

(Testimony of Lawrence S. Fletcher.)

Mr. Rank: Mr. Cook just called my attention to the fact that Z is still for identification. I ask that it be marked in evidence as Defendant's Exhibit Z.

The Court: Admitted.

The Clerk: Defendant's Exhibit Z admitted into evidence.

(Whereupon, Defendant's Exhibit Z for identification only was received and marked into evidence.)

Q. (By Mr. Rank): I show you a copy of a letter with photostatic copy of tax bill attached to it, a letter addressed to Mr. Wilson, carbon copies to Mr. Ward and Dunne, Dunne & Phelps, and ask you if you sent the original of that letter with a copy of the tax bill?

A. I sent the original of this letter and the original tax bill.

Q. And the original tax bill of which this is a photostatic copy? A. Yes.

Mr. Rank: This letter of October 29, 1953, is addressed to A. K. Wilson with copies to Dunne, Dunne and Phelps:

"I am enclosing the Humboldt County tax bill for the year 1953-54, showing a total tax due of \$8,557.60, the first installment of which becomes delinquent on December 10, 1953, in the amount of \$4,278.80. [797]

"I am amazed you failed to exercise your rights to have this assessment reduced due to the fact that much of the timber has been logged therefrom. In

(Testimony of Lawrence S. Fletcher.)

April, 1953, I called this matter to your attention, allowing plenty of time for you to have the assessment lowered in amount. I again called your attention to this matter in time for you to have had the assessment corrected if you had exercised your rights before the Board of Supervisors of Humboldt County, sitting as a Board of equalization. In my judgment you are overpaying your taxes to the extent of four or five thousand dollars and is a needless expenditure of monies.

“I wish to call your attention to the fact that the first installment will become delinquent on December 10, 1953, and unless the same is paid by that time, we will have to give you Notice of Default.”

Mr. Rank: I ask that that be marked as Defendant's next in order.

The Clerk: That will be Defendant's Exhibit AH.

The Court: We cancelled AG, so we might as well make it AG.

The Clerk: Defendant's Exhibit AG marked for identification.

Mr. Phelps: Mark it in evidence, if you [798] want.

Mr. Rank: Yes, I am offering it in evidence.

The Clerk: Introduced and filed into evidence.

(Whereupon, letter referred to above was received in evidence and marked Defendant's Exhibit AG.)

(Testimony of Lawrence S. Fletcher.)

Mr. Rank: The attachment, if the Court please, is a copy of a Humboldt County tax assessment in 1953 showing the first installment of \$4,278.80 due November 1st, 1953, delinquent, December 10, 1953. I believe it is stipulated those taxes were not paid. Withdraw that for just a moment.

Q. (By Mr. Rank): A default notice was sent upon the failure of Mr. Wilson to pay those taxes on December 10th, was it not?

Mr. Phelps: It is in evidence and it is dated.

The Witness: Yes, it was. Later on—I mean after the 10th, or between the tenth and the 1st of the year, I had called, I believe, Mr. French in the interests of time to check with the tax collector to determine whether those taxes had been paid.

Q. And you found they had not?

A. I found they had not, and I telephoned Mr. Ward and a default notice was mailed.

Q. Did you have any further communication with Mr. Wilson to your knowledge concerning these taxes? A. Not to my knowledge. [799]

Mr. Rank: Now, Mr. Phelps, while we are on the question of taxes, two things: I believe you were going to check to determine whether or not the figures \$9,080.96 was the amount due on May 12th, 1953, on the 53-54 taxes.

Mr. Phelps: I was going to check?

Mr. Rank: Yes, that was the figure we had agreed upon subject to your ascertaining the correctness of it.

(Testimony of Lawrence S. Fletcher.)

Mr. Phelps: I don't recall that. I probably did, and if I did, I am sorry to say that I haven't.

Mr. Rank: That figure is contained in a letter that you received back from the tax collector.

Mr. Phelps: I didn't check it.

Mr. Rank: May it be stipulated that that is the amount?

Mr. Phelps: Subject to correction, certainly.

Mr. Rank: That was the same stipulation before.

Mr. Phelps: I have no correction to make, so that makes it easier for you.

Mr. Rank: Then I will ask that it be marked as Defendant's next in order.

Mr. Phelps: What is this?

Mr. Rank: That is a copy of the tax bill giving the figure \$9,080.96, and showing what it is for.

The Clerk: Defendant's Exhibit AH introduced and filed into evidence.

Mr. Rank: Also, Mr. Phelps, you were to obtain a copy of [800] the letter to the tax collector wherein you claimed to have made a tender.

Mr. Phelps: You are right about that, I was to, and I did search. In fact, Mr. Mills and I searched again last night, and I haven't got the copy of the letter and it isn't in any of the files that I have. I don't know what I can do for you. It must have been mislaid or misplaced. I don't know that it is particularly important. If you have a copy——

Mr. Rank: No, I don't have a copy.

Mr. Phelps: I will be glad to stipulate to it. Mr. Mills and I spent some time looking through

(Testimony of Lawrence S. Fletcher.)

all our files. It may still be misplaced, and if I find it, I will produce it. I can do no more.

Mr. Rank: Of course the importance of that letter—the reply from the tax collector was introduced in evidence and we understood that that letter made a purported tender——

Mr. Phelps: You are absolutely correct. I haven't got it.

Mr. Rank: The importance of the letter making the tender is to determine what the tender was for, because you have charged that the tax collector wrongfully refused the tender.

Mr. Phelps: I have searched the records and I will search again. If it is misplaced, I can't produce it. I will look again, because I am as anxious as you are to produce it; in fact, more so. [801]

Mr. Rank: Now, also, Mr. Phelps, there were two other sets of documents that you were to produce and have for us. One of them was a copy of the bank statements from the Los Angeles bank upon which Union Bond and Trust Company drew the checks that were sent as tenders for the payment of logs removed after January 1, 1954. Do you have them?

Mr. Phelps: Yes.

Mr. Rank: May we have them and offer them in evidence?

Mr. Phelps: I don't think it is proper, if your Honor please. This isn't the time for discovery. I have them here. But I think it is incompetent, irrelevant and immaterial. If counsel wanted it, the

(Testimony of Lawrence S. Fletcher.)

time to require it would be of course when the witness was on the stand and could be questioned about it.

Mr. Rank: Why, Mr. Phelps——

Mr. Phelps: I am willing to submit it to your Honor's discretion as to whether or not I should produce it.

Mr. Rank: I asked——

The Court: What is it?

Mr. Rank: Well, your Honor will recall this was discussed I believe in the pretrial conference wherein I pointed out that in a letter I had made a request for certain documents.

Mr. Phelps: And I said I would have them here, and I have. [802]

Mr. Rank: That is right. I didn't anticipate the question about it. That is why we were doing it that way. I wrote a letter and they were advised of it.

Mr. Phelps: Well, I have them.

The Court: All right.

Mr. Phelps: If the Court says that I have to turn them over to you, I will.

Mr. Rank: What I am getting at is this: That your objection is that it is something that should have been a matter of discovery proceedings. We requested it long enough before the trial.

The Court: I still don't know what it is you are talking about.

Mr. Rank: It is a copy of the Union Bond and Trust Company bank statements in the Los Angeles bank where the checks that were tendered to us in

(Testimony of Lawrence S. Fletcher.)

payment of the logs removed after January, 1954—the account on which those checks were drawn, and it was our desire to examine the statements to ascertain whether or not at the time these checks were issued there were funds to cover them.

The Court: I don't think it would be material now, unless you ask a question of some witness as to whether or not there was enough money in the bank to cover them. If he says "no," you can ask him to produce his bank statements.

Mr. Rank: That is my point. [803]

The Court: Or if he says "Yes," rather, you could ask him to produce his bank statements. I don't think you can make a discovery procedure in the course of the trial unless you are proceeding on some point created in the evidence itself, and there is nothing before the Court, you haven't raised that issue by any testimony.

Mr. Rank: If the Court please, they have claimed a tender. In fact they have put in a letter showing a tender and showing the delivery of these checks, the sending of these checks to us. I don't think that we are required on their case or at any particular time to follow up the request that we have made for documents which we would be entitled to see under discovery proceedings. We probably were a little lax.

The Court: It depends upon whether it is in issue or not.

Mr. Rank: It certainly would be an issue whether or not the tender was offered——

(Testimony of Lawrence S. Fletcher.)

The Court: It depends upon whether or not there is a question whether there was money in the bank to cover the checks. You have got to have something like that before the Court now to make the evidence admissible. We do not change the rules of evidence by discovery proceedings. The rules of evidence are just the same.

Mr. Rank: All right, your Honor—— [804]

The Court: Unless you are prepared to assert, on the basis of something that you know about, that they didn't have any money in the bank and these checks were fake checks and asked them to produce their bank statements, but until there is some record, some evidence on the subject, I don't see how they could be admissible.

Mr. Rank: We will come to it in a moment. We will pause for a moment.

Q. (By Mr. Rank): Mr. Fletcher, calling your attention now to the first employment of W. W. French, other than for the fire damage, I will ask you whether or not you were the person who made the arrangement and arranged for the first employment on behalf of Mr. Ward?

A. I was.

Q. Where was the arrangement made?

A. The arrangement was made between Mr. French and myself.

Mr. Phelps: And where were you at the time?

The Witness: In my office.

(Testimony of Lawrence S. Fletcher.)

Mr. Rank: What was the arrangement that you agreed upon at that time?

A. The arrangement was this: Mr. French came into the office and stated that he was representing the sage interests, California Barrel and the Arrow Mill.

Mr. Phelps: Wait a minute. When was this?

Q. (By Mr. Rank): Approximately when was this conversation? [805]

A. Well, it was in the latter part of 1952, I believe.

Q. Just a moment, Mr. Fletcher. I will show you a letter that may refresh your memory as to the date.

The Court: While you are looking at that, perhaps we might take a brief recess.

(Short recess.) [805-A]

Mr. Rank: The missing document has been found, if the Court please. May we offer the certificate of dissolution of the Blue Creek Redwood Company? Have you seen this?

Mr. Phelps: No objection. I haven't seen it, but I haven't any objection to it.

The Clerk: That's AI, sir, introduced and filed into evidence.

(Whereupon, certificate of dissolution referred to and identified above was received in evidence and marked Defendant's Exhibit AI.)

Mr. Rank: So we won't forget, may we at this time ask for a dismissal as to Blue Creek?

(Testimony of Lawrence S. Fletcher.)

The Court: Any objection?

Mr. Phelps: Well, I would prefer to let the matter rest on the record, if your Honor please. I don't want to consent to it.

The Court: I didn't ask you that. I just wanted to know if you are objecting to it.

Mr. Phelps: To the introduction of the document?

The Court: No, objecting on the basis of the certificate of dissolution, objecting to the dismissal of the action against the corporation.

Mr. Phelps: Well, yes. I want to let the record note that I do object to it, if your Honor please, because we take the position still that with respect to the—— [806]

The Court: Doesn't the State law cover it?

Mr. Rank: I believe so, yes.

The Court: The State law provides who shall be liable on the dissolution of the corporation. Let's not waste time discussing that.

Mr. Phelps: No, it does not.

The Court: It doesn't make any difference whether the action is dismissed against the Blue Creek or not. I don't think it makes a bit of difference, because the law takes care of it.

Mr. Rank: Very well. I just thought of something else, if the Court please. On this blanket assignment, I would like to have it marked in evidence. It contains, although there is no question about the assignment, it contains a provision that the assignees shall perform all the obligations of

(Testimony of Lawrence S. Fletcher.)

the corporation. I would like to have that in the record.

The Court: Very well.

The Clerk: That's defendant's Exhibit AJ introduced and filed into evidence.

(Whereupon assignment, referred to and identified above, was received in evidence and marked Defendant's Exhibit AJ.)

Mr. Phelps: AJ?

The Clerk: That's correct.

Mr. Phelps: Thank you. [807]

Q. (By Mr. Rank): I believe you testified as to the arrangement that you made with Mr. French for the doing of certain work up in the Ward properties? A. That's correct.

Q. Did you then report that to Mr. Ward and Mr. Strong? A. I did.

Q. And following that, sent a letter to Mr. French confirming the arrangement, copy of which I show you?

A. I sent him a letter. Yes, that's the letter, on August 25, 1952.

Mr. Rank: Without reading the whole letter, it is a letter addressed to Mr. French signed by Mr. Fletcher.

Mr. Phelps: May I see it?

Mr. Rank: Yes.

Mr. Phelps: Let me see it, because we may have no objection to it.

Mr. Rank: I thought I had given you a copy.

(Testimony of Lawrence S. Fletcher.)

Mr. Phelps (Examining): I have no objection.

Mr. Rank: Ask it be marked Defendant's next in order.

The Clerk: Defendant's Exhibit AK introduced and filed into evidence.

(Whereupon letter referred to above was received in evidence and marked Defendant's Exhibit AK.)

The Court: What's that letter?

Mr. Rank: That is just a letter confirming the arrangement [808] with Mr. Fletcher as to his employment and the purposes of it.

I can read the paragraph that contains the meat:

"Confirming our conversation, I have discussed with Mr. Harold L. Ward and Fred S. Strong the question of their paying a pro rata share of hiring one field supervisor to check upon the logging operations of Mr. Wilson on the Ward land. As I understand it, the supervisor is to stamp the various logs adjacent to the boundary line between the Ward and Sage property so that there will be no mixup, and perform other tasks in connection with the operations. He is to be your employee and not the employee of the Ward interests. I understand the cost of maintaining——"

The Court: Who is this letter addressed to?

Mr. Rank: W. W. French.

"I understand——"

Mr. Phelps: I have no objection to it. Of course I do reserve the——

(Testimony of Lawrence S. Fletcher.)

The Court: That refers to the employment by French of some employee?

Mr. Rank: Yes it refers to the employment of Harvey.

The Court: Oh.

Mr. Phelps: I submit it is not binding on the plaintiff, if your Honor please. [809]

Mr. Rank: "I understanding the cost of maintaining this field supervisor would be borne by the California Barrel Company, Arrow Mill and Ward interests, of one-third each, or upon such equitable basis as you determine, monthly bills to be rendered to each party. If in the future the Ward interests would wish to withdraw this type of field supervision, they are at liberty to do so on 60 days' written notice. If you have any questions in connection with this matter, kindly let me know."

The date of that letter is August 23, 1952.

Mr. Phelps: It is not offered as binding on the plaintiff, though, is it? I mean, it is just a matter between French and your client?

Mr. Rank: Well, yes; it's self-explanatory.

Mr. Phelps: All right, as long as you——

Q. (By Mr. Rank): Now, just briefly, Mr. Fletcher, commencing some time in the spring of 1953, did you begin receiving copies of what have been referred to here as the monthly Harvey reports?

A. I began to receive some reports, yes, from Mr. Harvey, once a month.

(Testimony of Lawrence S. Fletcher.)

Q. Yes. They came to the office, is that correct?

A. They came to the office, once a month.

Q. Now would you relate the circumstances that first brought [810] your attention to the possibility of a discrepancy or a failure to report logs by Union Bond & Trust and the date and the circumstances?

A. In January 1954, in the early part of the month, I had been checking the amount of the payments that had been made already, that we had received.

Q. From Union Bond & Trust?

A. Union Bond & Trust. And I wanted to figure out about how much we could expect in the future, because we were concerned over whether or not the contract was going to pay out, and so I had made a rough calculation that we should receive in January, when the 60 day period for November was up——

Q. May I call your attention, it would be October?

A. October? Yes, that's right, October. Because November 20th was the date 60 days after that.

And so I had calculated, I had looked back at that October report and calculated that I could, we could expect around, well, in excess of 12 to 15 thousand dollars. And when a week later I got a copy of the letter which the Union Bond & Trust Company had written to Mr. Ward and Mr.

(Testimony of Lawrence S. Fletcher.)

Strong, enclosing only about \$7,000 or some amount below \$10,000, I was surprised, and so I checked on Mr. Harvey's report, and for the first time I discovered that there was a discrepancy in the amount that we had received for that month, and the amount that should be due, and so I—— [811]

Q. What did you do then, if anything, Mr. French (Fletcher)?

A. Shortly thereafter, I wrote to Mr. French. I had gotten this report some time between the 20th and the end of the month of January or shortly thereafter, and, oh, I think it was about February, early in February——

Q. I will show you the letters in just a moment so you can refresh your memory as to the dates.

(Conversation among counsel out of hearing of the Reporter.)

Q. I show you a series of correspondence, Mr. Fletcher——

Mr. Rank: There is no question about it, I think most of these letters are in evidence, all except one, of Mr. Ward.

Mr. Phelps: That is exactly my point. I don't see any reason to have them marked again. They are all contained in the exhibit, the 1954 correspondence exhibit, which is in evidence.

Mr. Rank: Well, the 1954 correspondence, that's the French 1954 correspondence.

Mr. Phelps: Yes.

(Testimony of Lawrence S. Fletcher.)

Mr. Rank: That exhibit contains quite a bit of correspondence, if the Court please, and I thought it would be much easier and simpler to put this series in together as one exhibit as our exhibit.

Mr. Phelps: Well, I don't know whether you have any [812] interest in keeping this record down, but I should think that we wouldn't want to duplicate exhibits, if your Honor please. Every one of those letters are contained in Plaintiff's Exhibit No. 10, except a letter to Mr. Ward, to Mr. Fletcher.

The Court: Exhibit No. 10?

Mr. Phelps: Yes.

The Court: That is a letter of French to Fletcher.

Mr. Rank: I think—let's see if all these letters are in.

Mr. Phelps: It's a whole file.

Mr. Rank: Yes, there is a whole file of letters and it does contain copies of the letters, the correspondence between French and Fletcher. Now it was my thought that it would be much simpler—

The Court: Well, just call attention to them in the file why don't you?

Mr. Phelps: Yes.

Mr. Rank: All right.

The Court: There is no point putting in more letters.

Q. (By Mr. Rank): So you wrote Mr. French, did you not?

A. Yes, I see this letter dated January 29.

(Testimony of Lawrence S. Fletcher.)

Q. And that is the letter that is contained?

A. 1954.

Q. In Plaintiff's Exhibit No. 10?

A. That's correct. And I was concerned over the contract and [813] asked, gave him a list of the stumpage payments which Mr. Ward had received since May, 1953, which covered, I think there were six months' period from June on, June through October.

Q. And then on—go ahead. Will you finish your answer?

A. And so that he could—and asked him to check with the, Mr. Harvey's figures, and what was the reason for the discrepancy.

Q. And then you received a reply to that letter under date of January 31st, did you not?

A. Yes, on January 31st.

Q. Which in addition to discussing other matters, contains an answer to your January 29th letter on the second page?

A. That's correct, the last paragraph of his letter.

Q. Then on February 11, 1954, you communicated again with Mr. French?

A. That's correct.

Mr. Rank: Now if the Court please, both the January 31st letter and the February 11th letter are in Plaintiff's Exhibit 10.

Q. (By Mr. Rank): Now on February 11th, did you have a phone conversation with Mr. Owens?

(Testimony of Lawrence S. Fletcher.)

A. I had been trying to reach Mr. Owens for a week to ten days, and left word for him to call, and he never called back. And finally, on February 11th, I was able to contact Paul Owens and I told him that—— [814]

Mr. Phelps: Just a moment. As to the conversation, I object to that as incompetent, irrelevant and immaterial, hearsay and without foundation, not binding on the plaintiff Union Bond & Trust Company.

Mr. Rank: The fact of that conversation has been testified to by Mr. Owens and by Mr. Wilson.

The Court: I will overrule the objection.

Mr. Phelps: Well, but if it is for the purpose of impeachment, you can't do it by just asking what a conversation was. The witnesses are entitled to have the questions put to them, what was said. You don't go beyond the impeaching questions that were put to the witnesses, that's it.

Mr. Rank: We are not endeavoring to offer this for, necessarily, impeachment. I think that it's a common thing, two parties to a conversation——

The Court: I will overrule the objection.

Mr. Rank: Certainly.

A. I asked Mr.—first I started out and told Mr. Owens that I had discovered what I thought was a discrepancy in the figures, in the amount that we had been receiving and the total stumpage that had been taken off of the Ward lands, and asked

(Testimony of Lawrence S. Fletcher.)

him if he had the logging slips and the stumpage payments for the Union Bond & Trust Company, and he said, yes, he had them all in his office. I told him that Mr. French, W. W. French, who was our representative there, would come and would like to [815] check them. He said, fine, he could come along.

Q. And you so advised Mr. French in that letter, is that it?

A. I wrote Mr. French to go see Mr. Owens.

Q. Now did you receive a report from Mr. French as to whether or not he had been able to see Mr. Owens?

A. Yes, he wrote me—I think he either wrote me or telephoned me—as a matter of fact, wrote me, that he had contacted, Mr. Owens——

Mr. Phelps: The letter speaks for itself. You see that is what we get into here.

Q. (By Mr. Rank): Just a moment. Mr. Fletcher, do you recall whether he reported to you by letter?

A. Yes, he sent me this letter of February 19th that he had talked with Mr. Owens and they were making an appointment to meet the following week.

Q. In the meantime had he reported to you whether or not he had been in the Coast Redwood office?

A. Yes, he had telephoned me that he had been to the Coast Redwood office.

Q. What was the report he gave you as to his visit? A. Well, he told me——

(Testimony of Lawrence S. Fletcher.)

Mr. Phelps: That is objected to as hearsay and not binding on the Union Bond & Trust Company.

Mr. Rank: This subject matter has been opened wide open by plaintiff, and this report of January here and the letter [816] has been opened wide.

The Court: Mr. French testified to this?

Mr. Rank: Yes, Mr. French testified to it.

The Court: Then why do you need this witness on it?

Mr. Rank: It isn't the question——

The Court: Then it becomes subject to the objection that it is hearsay, and the only exception to that is if you are trying to establish the fact that an incident did occur at a certain time, in criminal cases particularly that is allowed, because it goes to the question of intent.

Mr. Rank: All right.

Q. Let's put it this way. Without stating what the report was, did you receive from Mr. French a report?

A. Yes, I had a telephone conversation with him.

Q. As to whether or not he had visited the Coast Redwood and inspected the books?

A. That is correct.

Q. Then did you have a further report from him as to whether or not he had been to Paul Owens' office pursuant to the appointment of which he advised you in that letter?

A. Yes, shortly after this Mr. French came into my office.

(Testimony of Lawrence S. Fletcher.)

Mr. Phelps: Just a minute; we will object to that as hearsay and without foundation.

Q. (By Mr. Rank): Did you have a report?

A. Yes, I had a report from him. [817]

Q. And what was the report?

Mr. Phelps: I will object to that. If it is a written report, I want to see it. If it is not in writing, I object to it as hearsay, without foundation and not binding on the Union Bond & Trust Company.

Mr. Rank: Withdraw the question.

Q. In other words, I believe it is established that he did make a further report?

A. That is correct.

Mr. Phelps: It has been asked and answered.

Q. (By Mr. Rank): Did you at any subsequent time make a report to Mr. Ward concerning this matter? A. I made a report——

Q. Just say yes or no. A. Yes.

Q. And what was the date of that report?

A. I made my first report to Mr. Ward in this regard about this possible discrepancy early in March, 1954.

Q. How was it made, orally or by telephone?

A. Mr. Ward called me from Boston and I told him over the telephone.

Q. And then did you make any further report to Mr. Ward? A. Yes.

Q. And when was that, approximately?

A. That was in Washington, D. C., in the middle

(Testimony of Lawrence S. Fletcher.)

of March. I [818] was on my way to Europe to visit and see a new grandson I had never seen.

Q. You saw Mr. Ward in Washington and had a conversation with him at that time and made a report? A. That is correct.

Q. Then Mr. Fletcher, you went on to Europe. And when did you return?

A. Not until June 16th, 1954.

Q. Calling your attention, Mr. Fletcher, to a letter dated June 25, 1954, addressed to Mr. A. K. Wilson from you, which is in evidence here, or which is Defendant's AE for identification, I ask you if that letter was sent by you to Mr. Wilson, and the attached was a reply which you received?

A. Yes.

Mr. Rank: We will ask that that be marked, if the Court please, Defendant's AE in evidence.

Mr. Phelps: May I see what it is?

Mr. Rank: Yes.

The Court: This went in I think on Mr. Wilson's examination.

Mr. Rank: Yes, they did.

Mr. Phelps: Yes, I was going to say I think they are in evidence.

Mr. Rank: They are marked for identification.

The Court: They are only marked for [819] identification?

Mr. Phelps: I have no objection to them if you want to put them in.

Mr. Rank: Yes.

The Court: All right; admitted.

(Testimony of Lawrence S. Fletcher.)

The Clerk: Defendant's Exhibit AE admitted into evidence.

(Whereupon documents previously marked Defendant's Exhibit AE for identification were admitted into evidence.)

Q. (By Mr. Rank): Now first of all, Mr. Fletcher, would you state what was said by you to Mr. Wilson in this telephone conversation?

Mr. Phelps: This is what date?

Mr. Rank: June 25th. The letter is dated June 25th.

The Witness: May I see the letter?

Mr. Rank: Yes.

Q. (By Mr. Phelps): Are you testifying from the letter, then? A. No, just——

Q. Or from memory, because the letter speaks for itself.

Mr. Rank: I think the witness is entitled to refresh his recollection from the letter that he sent and the letter he received.

Q. Do you recall this conversation, Mr. Fletcher? A. Yes, I do.

Q. Would you please state what you said to Mr. Wilson?

A. I called Mr. Wilson in—— [820]

Mr. Phelps: Let's establish when and where.

The Witness: On June 25th.

Mr. Phelps: And where the two were.

The Witness: 1953.

Q. (By Mr. Rank): And where were you?

A. I was in my office in Oakland.

(Testimony of Lawrence S. Fletcher.)

Q. And where was Mr. Wilson?

A. I don't recall whether he was in Portland or Los Angeles.

Mr. Phelps: All right.

The Witness: But I told Mr. Wilson that I had received information that he was receiving his payments from the Coast Redwood Company weekly, \$5.00 a thousand, and I wanted to know from him why that money wasn't being paid over to my clients on the 20th of the following month. And he said he was running short of money and he couldn't pay. I said, "Well, we don't intend to be your bankers; that that wasn't the purpose of the contract." And we didn't think it was fair for him to get money from the bankruptcy court for the purpose of paying the Wards under the contract and then not paying it over.

And he said well, he just couldn't help it. And I asked him why he hadn't been sending the pink log slips, and he said he couldn't understand why we hadn't received them, and he would telephone Paul Owens and have them sent to us.

Q. (By Mr. Rank): Do you recall how far behind the Union [821] Bond and Trust Company was in sending the pink slips and the reports, if you have any recollection now, Mr. Fletcher?

A. No.

Mr. Rank: That is all.

Mr. Phelps: Do you want me to go on? It is four o'clock, your Honor, but I will go on.

The Court: Yes.

(Testimony of Lawrence S. Fletcher.)

Cross-Examination

By Mr. Phelps:

Q. Now, Mr. Fletcher, I take it from what you have told us that your employment by Mr. Ward went beyond the normal relationship of attorney and client and you were designated by him to more or less oversee the performance under this contract, to represent him out here in that respect?

A. Well, only in certain areas where he authorized me to.

Q. Well, for instance, you would receive copies of all the reports of performance under the contract, didn't you, sir?

A. Yes, I did, because that grew up by custom.

Q. Whether by custom or not, isn't it a fact that you more or less became his agent to oversee the performance under this contract?

A. No, that isn't true.

Q. Well at any rate, you did assume the task of looking over these various reports that you received not only from Mr. Wilson but also from Mr. Harvey and Mr. French? [822]

A. I looked at them. Yes, I looked at them——

Q. And——

A. But largely from the point of view of what he was hired for.

Q. All right, but with respect to these Harvey-French reports, you knew and received these reports currently, didn't you, sir?

(Testimony of Lawrence S. Fletcher.)

A. Yes, and I read them from the point of view of those logging operations, not the information, factual information contained in them.

Q. Let's establish this, sir: First of all, there is no question about this. You in your office in Oakland, Mr. Fletcher, were receiving currently whenever payments were made, you were advised of the amount? A. Not all of the time.

Q. Well, you received copies of the letters of transmittal sending the checks?

A. Not all of them.

Q. Well during the calendar year 1953, you received all of them, didn't you, sir?

Mr. Rank: I think the letters in evidence will speak for themselves whether or not he did.

The Witness: I don't think I received all of them.

Q. (By Mr. Phelps): What is your recollection then?

A. My best recollection is that I didn't receive all of them, [823] likewise on the taxes I didn't receive all of them.

Q. Then let's understand each other: I am referring to stumpage payments.

A. Well, I can't recall whether I received all of them or not. If the report indicates that I received a carbon copy, I probably did, but I don't recall whether or not now I received all of them or not.

Q. Mr. Fletcher, you did receive, though, did

(Testimony of Lawrence S. Fletcher.)

you not, copies of all the correspondence and letters that Mr. Ward wrote to Mr. Wilson?

A. Well, I assume so, just like I assume that I mailed most of my letters to Wilson to you.

Q. Yes. And so that whether you got the information from the letter transmitting the check to Ward or whether you got the information from the letter acknowledging the receipt of the letter and telling the amount, you were at least advised currently when those payments were made, the amount and the amount of stumpage they covered?

A. I would say generally I probably did.

Q. And you in Oakland, month by month as those payments were made and as the reports showing the amount of logs removed were received, you received them currently in your office in Oakland?

A. That is correct.

Q. On the other hand, you were also receiving detailed [824] reports from Mr. French contained in this bound volume, Plaintiff's Exhibit 11?

A. Well, I received some reports. Now whether those are the ones I received—I assume so, Mr. Phelps, but I would have to—mine were copies; they looked like the same reports; not this complete detail; not all of this information.

Q. Now let's understand each other. When you say not all of the information——

A. In other words, I received a copy of something like this. Now whether or not I received all of them or not I don't know, but I received some reports.

(Testimony of Lawrence S. Fletcher.)

Q. The record won't show, Mr. Fletcher, what you are referring to. You received then what is entitled "Report of Ernest Harvey's Activities" weekly?

A. Yes.

Q. You received, did you not, monthly a sheet entitled "Scale of Ward and Sage-Wilson contracts"?

A. Yes.

Q. You examined those, didn't you?

A. No, I didn't.

Q. You received, did you not, letters, in addition to them, from Mr. French?

A. All on logging, yes, the answer is, but all referring to logging and logging practices, because Mr. Wilson's logging practices were terrible and we were concerned about [825] them.

Mr. Phelps: I will ask that that last go out, if your Honor please.

The Court: It may go out.

Mr. Phelps: I think Mr. Fletcher is an attorney—I will make no further comment.

Q. (By Mr. Phelps): Mr. Fletcher, you were familiar, first of all, with the land up there? You knew what the logging operation was, didn't you?

A. No, except I had been there once, Mr. Phelps; just once in 1950.

Q. You were familiar, Mr. Fletcher, with the locations of the various landings, weren't you?

A. On a map.

Q. Yes. You were furnished a map, weren't you?

(Testimony of Lawrence S. Fletcher.)

A. Yes, by Mr. Harvey—by Mr. French.

Q. And as these reports came in, you would note the contents thereof, and indeed, Mr. Fletcher, on occasion you would point out errors that they had made in the location of some of the landings?

A. Yes, as to logging practices, landings, but if I had discovered the error in the—the discrepancy in the amount of logs, the default notice would have gone out, or the termination notice would have gone out long before.

Mr. Phelps: Well, the Court can best decide on that. [826]

The Court: Besides the provision for cancellation, was there a provision in this contract that if there was a default in any payment, the vendor had a right to declare the whole balance due?

Mr. Rank: No, no, no election; all he could do was retake the property.

Mr. Phelps: No, your Honor.

Mr. Rank: That is a matter that I endeavored to point out at either the pre-trial conference or at the opening here, that this contract is different than an ordinary contract of sale because the vendee—

The Court: Of course there would no practical reason to stop the owner from asking the vendee, if he was in default, to pay up the balance or have a cancellation declared.

Mr. Phelps: Certainly not.

Mr. Rank: But he didn't have the right to do it;

(Testimony of Lawrence S. Fletcher.)

all he had was the right to retake possession of the property.

Q. (By Mr. Phelps): Now, Mr. Fletcher, let's take the month of July, 1953. You received a report shortly after that in August, didn't you—about the tenth, I believe Mr. Fleckner has testified, wouldn't that be about right, sir?

A. Generally somewhere around the tenth or fifteenth.

Q. All right. Now at that time, you received a report—we will just take July—and it showed removed from the Ward lands in the first week of July 253,954 and 88,133. You [827] noticed those figures?

A. Yes, I notice them now and I noticed it in January when I went back and found them, but I didn't look at them in July. That is what I am trying to tell you. And if I had I would have discovered them, but I assumed Mr. Wilson to be an honest man, and he wasn't.

Mr. Phelps: I would ask that that last go out.

The Court: Yes.

Mr. Phelps: And may I ask the Court to please to instruct the witness, who is a lawyer——

The Court: It isn't going to make any difference, because the parties look all alike to me, and their characterizations of each other do not mean anything at all.

Mr. Phelps: I shouldn't think so.

Q. (By Mr. Phelps): So that in any event there were, week by week, sir, the totals of the logs

(Testimony of Lawrence S. Fletcher.)

removed from the Ward lands that you could have totaled if you had wanted to.

The Court: I think you have made your point clear.

Mr. Phelps: I want to now establish what the figures are from their own records——

The Court: He has said he received these records, he didn't look at the figures at the time, and at a later time, when he did look and found these figures, that is when he gave these notices or called the attention of the other side. That is clear. That is the witness' testimony in effect. [828]

The Witness: That is correct.

Q. (By Mr. Phelps): You are also familiar with Plaintiff's Exhibit 7, which is an exhibit, sir, a summary of what shows in these other reports?

A. I am not familiar with it, no.

Q. A summary of Plaintiff's Exhibit 7?

A. No, I have never seen it before.

Q. I got this out of your office, Mr. Fletcher.

A. It was prepared April 26th, 1954, and I was in Europe.

Q. Have you seen it at any time?

A. No, I have never seen it before in my life.

Q. Perhaps we misunderstand each other.

A. I have never seen it before in my life.

Q. From the Ward lands, it gives the same figures that you had and shows that at that time for the month of July, Mr. Harvey reported from the Ward lands, 2,782,345 feet removed.

(Testimony of Lawrence S. Fletcher.)

Mr. Rank: We submit the document speaks for itself.

Mr. Phelps: I want to establish these figures.

Mr. Rank: Also the further objection that it is improper cross-examination. I think it is beyond the scope of our direct examination.

Mr. Phelps: If your Honor please, this is quite vital. It shows that they had the information all along and that Mr. Fletcher had the information all along as to the exact [829] footage there, and in every instance it is more than the amount of footage for which they were receiving payments. He had both that information and could have checked it. It goes to two questions. It goes to the question whether the failure was willful. It goes to the question of whether or not they are estopped now to assert it.

The Court: It don't think it has anything to do with the failure on the part of the other party, and I have serious doubts—you may have some cases on it—as to whether or not this has anything, there is any basis for a legal waiver or estoppel.

Mr. Phelps: Well, I think it is.

Mr. Rank: Well, subject to Mr. Phelps'—

The Court: Well, the mere fact that a party may not be alert would not necessarily establish a waiver or estoppel. I mean, you have to have something a little stronger than that.

However, I don't think that the question of waiver or estoppel is particularly important.

Mr. Rank: There's another thing.

(Testimony of Lawrence S. Fletcher.)

Mr. Phelps: Very well.

Mr. Rank: That's in the record that Your Honor——

The Court: I think it is all going to come back eventually, to whether or not there was justification for a forfeiture. That's all. And I don't think it is going to [830] depend upon the question of the waiver of the lack of alertness on the part of the other side of the contract to discover the act that constituted the breach. Depends almost entirely upon whether or not the forfeiture—as to whether or not the forfeiture is justified or not, it depends almost entirely upon what the other party did, and the general relationship of the parties at the time.

Mr. Rank: I just wanted to make this observation, that even though Mr. Fletcher had those Harvey reports in August for July, he didn't have reports from Wilson to make a comparison until November, the middle of November.

The Court: Well, at any rate, what you are now questioning him about concerns a document which he doesn't know about, and it may be a ground for argument, you have already got that—what's that number? It's already in evidence, isn't it?

Mr. Phelps: Plaintiff's Exhibit 7 is in evidence, your Honor.

The Court: Yes, it is already in evidence, so you can make your own summary of that, of the record book that you have spoken of, and draw your own conclusions from that. But I don't know how you can make the witness testify as to a summary which he didn't see.

(Testimony of Lawrence S. Fletcher.)

Mr. Phelps: Well, all right.

The Court: Well—— [831]

Mr. Phelps: Suppose we take our recess at this time.

The Court: I think so. We get a little wearied sometimes.

Mr. Phelps: And we will start afresh in the morning.

The Court: Very well, tomorrow at ten o'clock.

(Whereupon an adjournment was taken until tomorrow morning at ten o'clock a.m., Wednesday, December 1, 1954.)

December 1, 1954—10:00 A.M.

The Clerk: Union Bond and Trust Company versus Blue Creek Redwood Company, further trial.

Mr. Rank: Ready, your Honor.

Mr. Phelps: Ready, your Honor.

The Clerk: Lawrence S. Fletcher on the stand.

Mr. Phelps: May I proceed, your Honor?

The Court: Very well.

(Whereupon the witness Lawrence S. Fletcher resumed the stand and testified further as follows:)

(Testimony of Lawrence S. Fletcher.)

Cross-Examination
(Resumed)

By Mr. Phelps:

Q. Mr. Fletcher, I had been asking you at the recess about the Harvey reports, and I won't go in now to the details of the figures. Let me ask you some general questions about it, if I may.

Now first of all, sir, with respect to those Harvey reports which are bound up in this black volume, there's no question about this, that you did make an examination of them to determine what information they showed and you knew currently what information was being reported to you?

A. I had the reports, but I was relying on Mr. Wilson's, the Union Bond and Trust Company's statement, and I did not check as I said yesterday, the actual figures of how much footage.

Q. Now my question isn't that, sir. All I want to know is [834] the form of the report, as to, not specific facts, now, but as to the form of the report, the kind of information that was being furnished to you, the form that it took and the form of the compilation, you were aware currently that, as to those matters? A. Yes.

Q. Yes. A. I did get the reports.

Q. Well, now, did you at any time after first receiving those reports, make any objection to the form or ask for any additional information from Mr. French?

(Testimony of Lawrence S. Fletcher.)

A. No, I did not. That was not my province.

Q. Well, did you ever suggest to Mr. Ward that he should request any further information or report any in a different form from Mr. French?

A. No, no, Mr. Ward was away for five months of this period in Europe, and I never discussed it with him at all.

Q. So far as you were concerned, you found the reports quite satisfactory?

A. No, I wouldn't say that.

Q. You would not?

A. I just never thought of it. I was looking at them, as I told you yesterday, from the logging point of view.

Q. Well, from whatever point of view, were these reports in the form that they were presented to you, satisfactory to you? [835]

A. I wouldn't say they were. These reports were being sent not only to us, but to the California Barrel and to Arrow Mill and to Sage, and I had nothing to do with the makeup of them. They were Mr. French's own idea.

Q. You were present when Mr. Ward testified and you recall he mentioned something about that these reports were not helpful to him, so he simply filed them away? Do you recall that?

A. A part of the testimony of Mr. Ward, I was not here, and I don't recall that.

Q. You don't? A. No.

Q. Well, were they helpful to you, sir?

A. Only in the statement as I have just got

(Testimony of Lawrence S. Fletcher.)

through stating, they were helpful as to the kind of logging that was being done, and I did not check the actual figures until January, as I told you, I wish I had.

Q. Then it is your testimony that there was no part of, no part of the purpose of these reports was to report to Mr. Ward the estimate of the number of feet of each species of logs being removed week by week?

Mr. Rank: Just a moment. That is an unfair question. Are you referring to some letter or some document? If you are, you should follow the terms of that document, Mr. Phelps.

Q. (By Mr. Phelps): Will you [836] answer——

Mr. Rank: Or show the document to the witness.

The Witness: Will you read the question?

Q. (By Mr. Phelps): Getting at the purpose, Mr. Fletcher, was any part of the purpose of these reports to report the number of feet, even if roughly, of each species of logs being removed during the week?

A. My recollection was that it was not.

Q. I show you a letter dated January 27, 1953, sir. It is a letter addressed to Mr. Fletcher, signed Harold L. Ward, with a copy to Mr. Lawrence S. Fletcher.

A. Yes.

Q. It reads as follows. You received this, did you not? This is in Plaintiff's Exhibit 9, your Honor—you received this, did you not?

(Testimony of Lawrence S. Fletcher.)

A. I assume I did.

Q. The letter reads as follows:

“Could you have Mr. Fleckner make a check once a week with Mr. Wilson’s superintendent as to what landings they were operating at and at least a rough estimate of how many thousands of feet of each species of logs has been removed during the week and send us a report? I think it is important for us to keep up to date on what is happening in the operation.

“With kind regards, very truly yours, Harold L. Ward.” [837]

A. Yes, and at landings, those reports were made. But as I have stated before, I did not check them, and I didn’t do so until January, 1954, and that’s where I made my mistake.

Q. Let’s see whether you checked them.

A. And if Mr. Wilson had performed his duty, we would have had them.

Q. Now let’s not argue about it.

Mr. Phelps: If your Honor please, I submit again——

The Court: The last statement may go out.

Q. (By Mr. Phelps): Mr. Fletcher, I call your attention to your testimony just now that they were not helpful to you, and ask you if you remember writing this letter to Mr. French, dated July 21, 1953.

A. Yes, that’s correct, I did.

Q. All right. And in that letter you stated:

“This will acknowledge the letters, memorandums and reports of Ernest Harvey’s activities for

(Testimony of Lawrence S. Fletcher.)

the month of June. There were several matters that interested me. It now appears that Mr. Wilson is logging heavily in the Ward lands, at landings 230-D, 230-E, 230-B and off of No. 100 road and in the extreme southerly portion of Section 32, off Road No. 200."

And I will stop there for a moment, sir. I take it, then, from the way you used those terms, the landings and so [838] forth, you are perfectly familiar with the location of all that land?

A. That's correct, and I was looking at it from the logging operation, because we were worried over the amount of timber that he was taking off and how it was being cut, and Mr. French's reports indicate it was not being cut very well.

Q. The letter continues, sir:

"Would you kindly make a small map on a letter-sized paper showing where the 100 Road is located and also on a separate sheet the No. 232 Series? These roads do not show on my last logging progress map, and I also note that Mr. Wilson has completed the 230-D setting and has moved to 230-E. In this connection, do you consider that all the merchantable timber has been logged in 230-D setting? If merchantable timber has been left behind, should we not now call his attention to it immediately?

"Under date of June 18, I note that Mr. Wilson is now endeavoring to complete the Southwest corner of Section 30 of the Ward timber. I assume you

(Testimony of Lawrence S. Fletcher.)

mean from landings 210-A to 11-A. In your general comments dated July 3rd, I note that Mr. Ken S. Elliott, a long-time scaler—(and that has to do with a scaler)——”

A. That is another violation of the [839] contract.

Q. Then I will read it if that is what you have to say about it. I will read, Mr. Fletcher, what you have to say about:

“In your general comments dated July 3rd, I notice that Mr. Ken S. Elliott, a long-time scaler for the Coast Redwood Company, has now quit and he has been replaced by Hank Nelson. I would appreciate receiving a little background information concerning Mr. Nelson, as to whether or not you feel he is a competent and conscientious scaler and one called for by the terms of our agreement with Mr. Wilson. You will recall this scaler has to be mutually satisfactory to us, and Mr. Wilson should have called this matter our attention. I suggest that you discuss this matter with Mr. Adkin. I believe the reports that are coming in are most helpful and informative. If I have a suggestion to make, it would be that a little bit more general information be given concerning the type of logging now being done by the Coast Redwood Company and its varied contractors. We are particularly interested in knowing whether or not a better job of logging is being done than in the past. I note that Mr. Wilson is endeavoring to build a road into the property of Township 11 North,

(Testimony of Lawrence S. Fletcher.)

Range 2 East Northwest. Do you think it possible for this road to be built [840] this fall, and sufficiently completed for them to start logging late in the winter? If the proposed road has been started, I would appreciate knowing where the road has been located. Mr. Ward is away from his office for a month or so and I would appreciate being advised currently, but with copies going to Mr. Ward.

“With kind personal regards, I am, Lawrence S. Fletcher.”

Now does that refresh your recollection?

A. Yes, it just confirms what I have got through saying, that I was paying attention to the logging operations. [841]

Q. Mr. Fletcher, I appreciate that you and I are both attorneys and we are in the same profession, but would you just give me the courtesy of letting me finish the question? A. All right.

Q. I am trying to be courteous to you, too. My question was simply this, sir: Does that refresh your recollection that these reports coming in to you were considered most helpful and informative?

A. Yes, as to the logging operation.

Q. You mentioned about a scaler. Without going into it, you then did receive a reply to that letter with respect to the scaler?

A. No, we hadn't—

Q. And it states as follows:

(Testimony of Lawrence S. Fletcher.)

“Mr. Elliott is back on the job. In talking to him last Friday he informed me that Mr. Nelson is a very reliable and competent man. He is scaling at this time those logs that are coming out of Section 32—Ward timber. The scaling set-up now is as it has been in the past.”

Subsequent to that, sir, do you recall Mr. Ward wrote his approval of Mr. Nelson as a scaler?

A. Yes, but the contract called for us to approve him before he started and we did not have that courtesy.

Mr. Phelps: Mr. Rank, you had a series of letters here [842] yesterday. Did you introduce them into evidence, on this subject?

Mr. Rank: No, we took them with us.

Mr. Phelps: May I have that, because there was included in that a letter which you showed me of January 29th from Mr. Ward to Mr. Fletcher. May I have that letter?

Mr. Rank: I don't think I have any of these Fletcher letters here this morning. If you had told me you wanted them——

Mr. Phelps: Mr. Rank, you said, “You won't object to this letter,” and I said, No, I wouldn't.

Mr. Rank: What has that got to do with the matter?

Mr. Phelps: I want that letter of January 29th.

Mr. Rank: If you had told me you wanted it

(Testimony of Lawrence S. Fletcher.)

this morning I would have had it here. It was here yesterday.

Mr. Phelps: You knew we weren't going to be here tomorrow. I want the letter of January 29th that relates to this matter. It is addressed to Mr. Ward, and you showed it to me yesterday, and it was within those letters that you had.

Mr. Rank: Mr. Phelps, if you want anything, if you will just tell me about it I will be sure to have it here. I am trying to keep my briefcases down.

Mr. Phelps: May I have it?

Mr. Rank: If I have it you may have it. If I don't you can wait until we go back to the hotel and get it.

Mr. Phelps: It started off when you suggested that we [843] had most of those letters already in evidence.

Mr. Rank: I don't have it with me.

Mr. Phelps: You have it over at the hotel and you can produce it after this noon recess?

Mr. Rank: Certainly, it is in San Francisco at the hotel. I don't have it with me this morning. Wait a minute. I didn't bring the matters that I used with Mr. Fletcher with me today.

Mr. Phelps: Just one moment, then, your Honor. I have no other questions then.

Mr. Rank: Wait; I may have it in another series.

(Private discussion between counsel.)

Mr. Rank: That is all, Mr. Fletcher.

The Witness: Do you want me back here any more? Because I have got——

Mr. Rank: I will bring that letter and it can go into evidence. As a matter of fact, I will put it in with Mr. Ward's testimony.

Mr. Kilpatrick please.

FRANK C. KILPATRICK

was called as a witness on behalf of the defendants herein, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court, sir? [844]

A. Frank C. Kilpatrick.

Direct Examination

By Mr. Rank:

Q. What is your occupation, Mr. Kilpatrick?

A. Lumber manufacturer and timber handling.

Q. What firms are you with?

A. I am with three firms, Rockport Redwood Company, Rounds & Kilpatrick, and Rounds Lumber Company.

Q. Are you an officer of any of those corporations—of those companies?

A. I am president of two of them and vice president of the other.

Q. Which two are you president of?

A. Rounds & Kilpatrick and Rounds Lumber

(Testimony of Frank C. Kilpatrick.)

Company, and vice president of Rockport Redwood Company.

Mr. Phelps: I am sorry; I couldn't hear you. I could hear you but you didn't enunciate distinctly enough for me to hear those names.

The Witness: I am nursing a cold; I guess it isn't very clear anyway. Shall I repeat that?

Mr. Phelps: Yes.

Mr. Rank: Please repeat them.

A. Rounds Lumber Company and Rounds and Kilpatrick Lumber Company, I am president of those two; and vice president of Rockport Redwood Company. [845]

Mr. Phelps: Thank you.

Q. (By Mr. Rank): Just state generally where they are engaged in business and the type of business, for the record, please?

A. Our timber holdings are in Mendocino County. That is where the Rockport saw mill is. Our remanufacturing plant, which is a separate corporation, Rounds & Kilpatrick Lumber Company, is in Sonoma County near Cloverdale, and the Rounds Lumber Company is the sales office for both of those companies, and it is located in San Francisco.

Q. You deal in redwood, do you, Mr. Kilpatrick?

A. Mostly redwood, yes.

Q. And how long have you been connected with those companies and engaged in the lumber business in Northern California?

A. About 17 years.

(Testimony of Frank C. Kilpatrick.)

Q. State generally what are your responsibilities insofar as the purchase and sale of timberlands are concerned?

A. I have been in charge of these properties ever since we took them over, and we have been adding timber to our original holdings, and we have been selling off some timber at times that it was more advantageous to get other timber to replace it.

Q. In the carrying out of those responsibilities was it your responsibility to keep abreast of the various sales of timber and market values of timber?

A. Yes, we watch that very closely. [846]

Q. Approximately how many acres of timberlands have you supervised the purchasing of for your operation?

A. Well, altogether about 40 thousand acres.

Q. And those are mainly situated in northern Mendocino County, are they not, Mr. Kilpatrick?

A. Yes.

Q. Are you familiar with the timber area up in Humboldt and Del Norte Counties, having particular reference to the west watershed of the Klamath?

A. Well——

Q. That is where the Sage properties are?

A. Yes, fairly familiar with it.

Q. Did you have occasion to make a survey of that area some years ago?

A. Soon after we bought the property in Men-

(Testimony of Frank C. Kilpatrick.)

docino County we had our engineers make a survey from Crescent City clear down to Santa Cruz.

Q. And did that include this particular area? May I show you a map, Mr. Kilpatrick, referring to Plaintiff's Exhibit 14. Are you generally familiar with the area appearing on the map here?

A. Well——

Q. Here is the Klamath River?

A. With the general area, yes.

Q. Pointing now to the colored sections; the yellow is Sage [847] lands, I believe the orange down below is Sage land; the green is Ward lands; part of it are Blue Creek lands. Are you generally familiar with that area? And the timber in that area?

A. Well, we discussed the purchase of some of the Ward timber with Mr. Ward some years ago when we made that survey around 1940 or '41, so we have some idea of what that timber was.

Mr. Phelps: What was that date?

Mr. Rank: 1941.

Q. Are you familiar with the French cruises on the particular property that is involved in this matter—that is the Blue Creek property?

A. Well, I saw them yesterday on the map that I had in my files from those earlier years, after I had talked to Mr. Ward about it.

Q. And you looked at the topography as shown and the general situation as to the terrain and logging conditions, did you? A. Yes.

(Testimony of Frank C. Kilpatrick.)

Q. And also as to the cruise as to the timber, quality and quantity, both redwood and fir?

A. Yes.

Q. And I believe you testified you are generally familiar with the quality of the redwood and the quality of the timber in that area?

Mr. Phelps: That is leading and [848] suggestive.

Mr. Rank: I asked him——

Mr. Phelps: Find out what facts he knows about it.

Q. (By Mr. Rank): Are you familiar generally with the quality of the redwood and fir in that area?

A. I think I have a pretty good idea of it.

Q. I believe the cruises that you saw, Mr. Kilpatrick, were the cruises of this area down in Township 11 of virgin timber? A. Yes.

Q. Have you formulated an opinion as to the reasonable market value of that timber?

Mr. Phelps: I will object to that as incompetent, irrelevant and immaterial, without foundation that this man is qualified to express such an opinion on these lands as of this time. We have got it down to a time of '40 or '41 when he was having a survey made.

The Court: Have you developed whether he had bought and sold timberland?

Mr. Rank: Oh, yes, I thought it was thoroughly developed.

The Court: No, I don't think so.

(Testimony of Frank C. Kilpatrick.)

Q. (By Mr. Rank): During the course of your operations and your supervision of the company have you bought and sold timberland yourself?

A. Yes.

Q. And I believe you testified that you had some 40 thousand acres altogether? [849]

A. That is the original holding. We still retain 30 thousand of that.

Q. And you have bought and sold timberland during the period of your operations?

A. Yes.

Q. And I believe you testified that it is part of your responsibility to keep abreast of the market values?

A. Yes.

Mr. Rank: There is a question if he had formulated an opinion as to market value as of May 12th, 1954.

Mr. Phelps: Objected to, if your Honor please, as without foundation. I ask permission to cross-examine on the voir dire, if I may.

The Court: Is that the last question you are going to ask him?

Mr. Rank: No, no, I am going to ask him——

The Court: Then the value?

Mr. Rank: Yes.

The Court: That is all you are putting him on for?

Mr. Rank: Yes.

The Court: I will allow counsel to cross-examine on voir dire.

(Testimony of Frank C. Kilpatrick.)

Mr. Rank: I may have one or two other questions, but I mean——

Mr. Phelps: I didn't mean to interrupt [850] you.

Mr. Rank: No; go right ahead. Let's get this over.

Q. (By Mr. Phelps): Mr. Kilpatrick, when was the last time that you were up in those lands, the Ward lands?

A. I don't know that I was ever in those lands but I have been in adjacent territory. Two years would be the last time. I get up there quite often.

Q. What is adjacent? Do you mean in the county, or do you mean within a mile or so of there? What are you talking about?

A. Within a mile or so.

Q. In the timber business have you had any business in actual logging operations at all?

A. Yes.

Q. You had this survey and caused the survey to be made back in 1940-41? A. Yes.

Q. You have never made any investigation of that area since that time, have you? A. No.

Q. With respect to your timber holdings that you have bought and sold and traded in within the last three or four years, have they all been in Mendocino County and Sonoma County?

A. Yes.

Q. So that you haven't traded in any timber in the Humboldt-Del Norte area in the last two or three years? A. No. [851]

(Testimony of Frank C. Kilpatrick.)

Q. All right. And you are not engaged as a broker buying timber for others, are you?

A. No.

Q. So the only connection or relationship that you would have in any way to the buying of timber would be for these companies that you are an officer of? A. Yes.

Q. And the total amount of timber that you hold at the present time is 30 thousand acres?

A. Yes.

Q. And that is in Mendocino County and Sonoma County and Santa Cruz?

A. No, it is all in Mendocino County. We have no timber holdings in Sonoma.

Q. So with respect to values of timberlands, your knowledge then is of the values in Mendocino County where your holdings are?

A. Well, we keep track of values of redwood all up and down the coast because it influences our deals.

Q. But so far as your knowledge other than just hearsay, so far as your knowledge from actually dealing in it, it is all in Mendocino County?

A. That's right.

Mr. Phelps: Just one moment, if your Honor please.

Q. With respect to Mendocino County, when did you make your [852] last purchase or your last sale?

A. Well, I think our last purchase was made the early part of this year.

(Testimony of Frank C. Kilpatrick.)

Q. How big a tract was that?

A. About 10 million feet—10 or 12 million.

Q. I don't want to go into too much detail at this time, sir, but just say in the last two or three years, how many such transactions of purchase and sale in Mendocino County have you participated in?

A. Well, I would think about 12 or 14, involving, oh, 30 or 40 million feet of timber adjoining our property.

Q. You said that you dealt principally in redwood. How about fir? Do you also have anything to do with that, or sales of redwood products?

A. We harvest the fir along with the redwood and put it through our mills, our plants.

Q. Did any of those transactions involve fir—Douglas fir?

A. Well, it is California fir; it isn't true Douglas fir, I understand.

Q. You recognize a distinction, do you not, between the Douglas fir of the type and quality of the Douglas fir from the northern part of Humboldt County as compared to the southern part of Humboldt County, don't you, sir? That there is considerable difference?

A. No, I don't believe there is very much difference in the [853] fir in the redwood area.

Q. It is recognized, is it not, that Douglas fir varies in quality from the northern part of Humboldt County where this is—pardon me, from the

(Testimony of Frank C. Kilpatrick.)

northern part of Humboldt County to the southern part of Humboldt County?

A. I don't recognize that myself, and I don't know who does.

Q. Do you recognize that there is a substantial difference between Douglas fir in the area covered by these lands and the type of fir of a different species that is in Mendocino and Sonoma Counties?

A. I don't think so.

Q. What is the species? Is it different—

A. What is what?

Q. What is the species of fir that you have dealt with?

A. Well, the only difference I know of, in Washington and Oregon that fir is different than California fir. I think all California fir is about the same.

Mr. Phelps: I have no other questions, your Honor. I submit I don't think this witness is qualified to express an opinion as to values in the Humboldt area. He may know of some transactions in Mendocino County, but it a completely different market, the conditions are entirely different, and even logging conditions are different; the market is different.

The Court: He says he is familiar with it.

Mr. Phelps: But not from acquiring experience in his [854] position to qualify him as an expert.

The Court: I think he is just as qualified, as, say, Mr. Wilson was, who dealt in this.

(Testimony of Frank C. Kilpatrick.)

Mr. Phelps: Except Mr. Wilson was dealing in this particular area.

The Court: We can't have another man familiar with that if it applies to somebody else.

Mr. Phelps: I mean in the general area, your Honor.

The Court: I will allow him to testify.

Mr. Phelps: Very well.

Mr. Rank: I think the question was, Have you formulated an opinion as to the value of the property in which we are interested?

Mr. Phelps: In that you are talking about the whole property?

Mr. Rank: No.

The Court: You are talking about virgin timber?

Mr. Rank: Virgin timber in Township 11 as of May 12, 1954. You may just answer yes or no.

A. Yes. [855]

Q. What is your opinion as to the value—May I withdraw the question?

What is your opinion as to the market value at a cash sale of the date about May 12th, 1954, of the land involved in this action in Township 11?

Mr. Phelps: Objected to; just let the record show the objection. Objected to that it is without foundation, that the witness is qualified to express an opinion on what appears affirmatively that he has not been in on the land, in and around the time, has no knowledge of the particular land, as well as, he is without knowledge as to the general values in

(Testimony of Frank C. Kilpatrick.)

that area. I wanted to point out that, because I neglected to, that there has been now showing that the witness knew this particular land and had been in and on that land recently enough to formulate an opinion.

The Court: I think the witness is qualified to express an opinion. Overruled.

Q. (By Mr. Rank): What is your opinion to the value?

A. I estimate it would be worth about \$300,000.

Q. Now just going a little further, Mr. Kilpatrick, are you familiar with the general details of any recent sales in this area, the general area to which we are now referring?

A. Well, it was published just a few days ago, the sale of——

Mr. Phelps: Well, now, just a moment, if your Honor please. That is not proper on direct examination. [856]

The Court: Pardon?

Mr. Phelps: That is not proper on direct examination, evidence of recent sales. If I choose to bring it out on cross-examination, I may, but as I understand the rule—and because of your Honor's comments the other day, I have looked at it——

The Court: Well, he has already given his opinion.

Mr. Rank: Yes, all right.

Q. (By Mr. Rank): Mr. Kilpatrick, in your operation, have you acquired—I don't mean acquired by purchase—but have you developed

(Testimony of Frank C. Kilpatrick.)

some logged-over lands? A. Yes.

Q. And approximately how many acres?

A. About sixteen or seventeen thousand.

Q. And where are they located?

A. They are in Mendocino County.

Q. And that consisted, did it, of fir and redwood? A. Yes, sir.

Q. Now have you attempted to ascertain the market value of your logged-over lands?

A. Yes, we have an engineer who has recently done a good deal of work up in Washington for one of the pulp companies. He is now with us, and we got him to use the same method of evaluating those lands as they are using up north.

Q. Mr. Kilpatrick, may I interrupt you? I am just asking [857] you another question. May I reframe my question.

Did you yourself attempt to ascertain the value of logged-over lands in the Northern California redwood area, make any attempts?

Mr. Phelps: These are preliminary?

Mr. Rank: Yes, these are just preliminary.

The Court: Yes.

Mr. Rank: You understand my question?

A. Did I attempt to evaluate those lands?

Q. Yes. A. Yes, I did.

Q. And what did you do in the process of attempting to evaluate them for your own purposes?

Mr. Phelps: You are talking about——?

Mr. Rank: I mean, these are just preliminary. These are logged-over lands generally.

(Testimony of Frank C. Kilpatrick.)

Mr. Phelps: I understand that, but I didn't understand whether you were talking about the lands involved here or lands in Mendocino County.

Mr. Rank: No, I am not talking about the lands involved here.

Mr. Phelps: Well, then, I think it is incompetent, irrelevant and immaterial. We should find out about the lands involved.

Mr. Rank: Well, these are preliminary questions and I am [858] talking now——

The Court: I will allow it.

Mr. Rank: Yes, proceed, Mr.——

The Witness: What was the question?

Q. (By Mr. Rank): The question was, what did you do in an endeavor to ascertain market value of logged-over lands in the redwood area?

A. Well, we had our engineer look them over and then we tried to find out whether there had been any sales of logged-over lands to establish the value, and we didn't find any sales, so we don't know what they are worth.

Q. In other words, you made an attempt in your survey of this redwood area to see if there had been any prior sales or other sales of logged-over lands?

A. Yes.

Mr. Phelps: This is leading and suggestive.

Q. (By Mr. Rank): And you were not able to arrive in your own mind, for your own business purposes, at a value? Is that what I understand your testimony to be?

Mr. Phelps: Object to that as leading and sug-

(Testimony of Frank C. Kilpatrick.)

gestive, if your Honor please. Let the witness testify what he found.

The Court: Were you?

The Witness: No.

Q. (By Mr. Rank): Now what did you do then, and just [859] explain, Mr. Kilpatrick, to determine a valuation of your own logged-over lands?

A. Well, we had this engineer I mentioned come down and run strip cruises through them. Then we estimated what the land might be worth to us as a salvage operation.

The Court: Did you make that estimate on the basis of the value per thousand feet?

The Witness: Yes.

The Court: What estimate was that?

The Witness: Well, it ran between three and four dollars.

Mr. Phelps: Well, I don't mean to interpose, but if your Honor please, I am going to raise an objection to that, as the precise type of information that I wasn't permitted to elicit from the witness, because it would be based on what he could get off of it. He has just established that he is basing this on what he would estimate that he could get his return from.

The Court: Your witness gave an estimate of the market value of a logged-over land on the basis of so much per thousand feet of timber. He used that as the basis for valuation. That was all—rather than by equities. Your witness testified——

Mr. Phelps: Yes, I understand that, but——

(Testimony of Frank C. Kilpatrick.)

The Court: He testified, I made a note of it here—— [860]

Mr. Phelps: But perhaps I——

The Court: Mr. Wilson testified that in his opinion the value of the logged-over land was \$7.00 per thousand feet, so his standard of value was not on so much per acre or so much per total, but it was on the basis of——

Mr. Phelps: Yes, your Honor.

The Court: So you would have to ascertain the amount of footage and then multiply it by seven, and that was the basis of his valuation. That's the same question I asked this witness.

Mr. Phelps: Except this, your Honor. This witness is an expert who is now testifying, and if he is permitted to answer this question, would testify not as to market value from other sales, as your Honor has indicated is the method of determining market value, but what apparently he said, that he is estimating this on what it would cost him to, and what he would recover from the logged-over lands, and I submit, if your Honor please, that that question would be improper.

The Court: Well, in that form I think you are right. I didn't—that isn't the question I asked him.

Mr. Phelps: Well, I thought it was, at least I thought it elicited that after the information came out, that he had no knowledge of any sales.

The Court: Well, I will withdraw my question. What I intended to ask the witness was whether

(Testimony of Frank C. Kilpatrick.)

or not—I first [861] asked him whether or not he made his valuations on the basis of so much per thousand feet of timber, and he said he did. That's what I understood him to say. Then I asked him what that was.

Mr. Rank: That's correct.

Mr. Phelps: But your Honor appreciates that what he is basing this on is the value of his properties.

The Court: I withdraw all my questions and you lawyers proceed, then. What I was trying to do was save some time.

Mr. Phelps: What I had in mind was, he is asking about this down in Mendocino County.

The Court: Well, it is true, it is not in this particular place, but you might develop comparable nature, if there is comparable nature.

Mr. Rank: That would go to the weight anyway.

Q. (By Mr. Rank): Did you arrive at a valuation of your logged-over lands?

A. Yes.

Q. And was that valuation based upon a per-thousand basis? A. Yes.

Q. And what does the valuation that you arrived at——

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial.

The Witness: Between three and four——

Mr. Rank: Just a moment, please. [862]

(Testimony of Frank C. Kilpatrick.)

Mr. Phelps: Incompetent, irrelevant and immaterial, without foundation, it is the valuation of other land without any showing that they are substantially of the same character, that the conditions would be the same——

The Court: Yes, you would have——

Mr. Phelps: And that he has any knowledge to compare it.

The Court: I think you would have to put before the witness, if he hasn't seen the logged-over area in this case, some hypothetical question or something upon which you could base a comparison, unless you are able to establish, which I don't think you could, that the value of all logged-over lands is the same.

Mr. Rank: No, what I—my purpose in this is really, this witness cannot testify as an expert as to the value of this particular logged over land, and it isn't my purpose——

The Court: Well, then, why don't you leave that go, if you have someone else on that?

Mr. Rank: No, I think, if the Court please, that his testimony as to the values they placed on their logged-over lands is something to be taken in, the objection would go to the weight rather than to the admissibility, I believe, of it.

The Court: Well, there I don't think that would. In other words, the valuation of the witness' logged-over lands at a different place and under circumstances that have not yet been shown

(Testimony of Frank C. Kilpatrick.)

to be similar to those existing in the present [863] area, would be too remote, the value of this particular logged-over lands. Have I made myself clear?

Mr. Rank: Yes, sir, you have; but——

The Court: I don't think that that would be admissible unless you would be able to establish, lay a foundation for the witness to testify, on the basis of some hypothesis that would relate the nature and circumstances of this property to those which he logged.

Mr. Rank: Let's see what we can do.

Q. (By Mr. Rank): Mr. Kilpatrick, are you familiar with logging operations? A. Yes.

Q. And do you, in the course of your business, generally supervise logging operations?

A. Yes.

Q. And are you familiar with the condition and nature of logged-over land, after it has been logged over?

A. We investigated it quite thoroughly, especially the Arcata Redwood Company's holdings in Humboldt County.

Q. And where are they?

A. East of Arcata.

Q. East of Arcata, and with relation to the property which we are discussing now, could you state how far the Arcata Redwood holdings are?

A. Oh, they are about a hundred miles north of our property. [864]

(Testimony of Frank C. Kilpatrick.)

Q. Well, I mean with relation to the Blue Creek property that we are talking about.

A. Oh, well, it can't be but very few miles south and east of there. Some of it is east of that property.

Q. Some of it is east of that property. Some of it is south?

A. As I remember it, yes. The reason we went up there was to see if we could get some ideas about salvaging our own land. They made—Arcata Redwood has made considerable progress in salvaging cut-over land.

Q. And would you say that the conditions you found there—what would you say about the conditions you found there as to the way they compare with your own logged-over land?

A. Well, we are thinking very seriously of duplicating their—

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial, on other logging operations, the Arcata Redwood Company. We are just wasting time, because it isn't going to establish his knowledge of these lands.

The Court: I think that that objection is good. It would only elicit the witness' opinion, an opinion to be given as to logged-over lands here, without any knowledge.

Q. (By Mr. Rank): What generally, Mr. Kilpatrick, is the nature of the logged-over lands, that is, after the timber has been removed? What

(Testimony of Frank C. Kilpatrick.)

general conditions do you find that may create a similarity or a variance in the area? [865]

The Court: Why don't you ask him the question of what other considerations that an experienced man in the business takes into consideration in determining whether or not he is going to do anything with logged-over lands?

Mr. Rank: All right. I am a little afraid of that, but I will ask that.

Mr. Phelps: That's a frank statement, Mr. Rank.

The Court: What did he say?

Mr. Phelps: He said, "I am a little afraid of that, but I will ask that."

Mr. Rank: Of course you don't know the reason I am afraid of it.

Q. (By Mr. Rank): What are the considerations, Mr. Kilpatrick—

The Court: Well, if I am not being helpful, just disregard what I say. But that's the question that I would ask, because I always like to get right down to the heart of the matter.

Mr. Rank: All right, let's go right to it, then.

Q. (By Mr. Rank): What other considerations, Mr. Kilpatrick, that a man in the lumber industry would take—the fact is that a man in the lumber industry would take into consideration to determine the value of logged-over lands?

A. The residual timber and the regrowth timber,

Q. What do you mean by that?

The Court: You would have to take into account

(Testimony of Frank C. Kilpatrick.)

other things, the nature of the equipment you would have to use—— [866]

The Witness: Oh, yes.

The Court: The access?

The Witness: The roads being already built, I see what you mean, Judge. The property is all opened up. You have to consider that as adding to the value.

Q. (By Mr. Rank): In other words, that the roads are in? A. Yes.

Q. And take into consideration the type of equipment you would have to use to get it out?

A. Yes.

Q. And the proximity to the market?

A. Yes.

Q. And the recovery as to the quality of logs which you would get out? A. Yes.

Q. In other words, if you would get a high-grade log in the fir, it would create a higher value than if you were getting low grades out; is that correct?

A. Well, in the first logging, usually you get the high-grade trees, but the trees that are left may contain two or three different grades of logs which you have to segregate.

The Court: Then you would also have to consider the time you wanted to do it, what the conditions of the lumber market were, would you not?

The Witness: That's right. [867]

Q. (By Mr. Rank): And whether you would have to have a split-stock program or whether you would put in a portable mill, and those very things

(Testimony of Frank C. Kilpatrick.)

are factors you take into consideration in determining the value of logged-over lands?

A. Yes.

Q. Now, in making the determination of the value of your lands, did you take into consideration those factors? A. Yes.

Q. And took into consideration the factor of the type of trees there, the specie and the quality; is that correct? A. Yes.

Q. Now, at what valuation did you arrive at as to your own logged-over lands?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial, without foundation, showing that any similarity exists.

The Court: I think you would have to establish that there is some relationship on the factors involved to this particular land.

Mr. Phelps: They vary so.

Mr. Rank: Well, let's try one thing more.

Q. (By Mr. Rank): Mr. Kilpatrick, in your familiarity with logged-over lands generally, would you state whether or not there is a general similarity or a variance, and if there are any variances, what they are? [868]

A. Well, it depends entirely on how the land has been logged in the first place, but there is a great similarity between logged-over land.

Q. Now, if there was a—by “difference” in how the logging was conducted, what do you mean?

A. Well, there are all grades of selective logging. Some people take just the top grades and let the

(Testimony of Frank C. Kilpatrick.)

others grow; others take 50 per cent or 60 per cent or 70 per cent of their standing timber and go back and get the other later. Some people log it clean.

Q. How would that difference in logging affect the per-thousand value of the remaining logs and timber, if at all?

A. Well, if only 50 per cent of the standing timber were taken on a selective basis, the remaining timber would be much more valuable than if it were taken, more of the timber were taken off on the first logging. Do I make that clear?

Q. Yes, I think you do, Mr. Kilpatrick. What causes that difference in value?

A. The grade of the timber that is left, the residual timber——

Q. And does the quantity of the timber and logs remaining in the ground as timber—that is, timber and logs remaining on the ground, affect the value?

A. Well, you can't leave fir on the ground very long. Redwood can be on the ground for a long time. But that would [869] have a certain value in evaluating the cut-over land.

Q. Do I understand that the reason for the difference in value is—withdraw the question.

Is the difference in the value caused in any extent by the difference in the cost of logging or relogging?

A. Yes, I would think so. I don't know that I understand your question, exactly.

Q. What I am getting at is this. The thicker your stand of timber and the thicker, the heavier, the greater the quantity of logs per acre, the lower the cost of logging; is that correct?

(Testimony of Frank C. Kilpatrick.)

A. That is right; yes.

Q. And that is what I had in mind.

A. Yes; that's right. That's correct.

Q. Now, what was the total? Did you estimate or cruise and obtain the total amount of merchantable timber remaining on your logged-over lands?

A. Yes.

Mr. Phelps: Still I am objecting; without foundation.

Mr. Rank: Well, that is just as to quantity.

Mr. Phelps: Oh, but there has been no showing and there can be no showing from this witness that he knows the circumstances there, that the same factors are found.

The Court: Yes. There is no doubt about that.

Mr. Phelps: We are just wasting time. [870]

The Court: Is this the only witness you intended to put on on the subject of the value of logs? I don't think the witness is——

Mr. Rank: No; I see.

The Court: I don't think the witness can be qualified unless he knows the condition of the logged-over land.

Mr. Rank: We appreciate that, if the Court please, and my thought is this: That this witness, of course, cannot testify as to the value of that particular piece of property—logged-over lands. My thought was that because of the survey they made on their own lands and the value of their own lands, that that could be helpful in this matter. We are not——

(Testimony of Frank C. Kilpatrick.)

The Court: Well, the value of the logged-over lands that are controlled by this witness might well be three or four dollars per thousand as he indicated; and yet the value of the logged-over lands involved here might be greater or less, depending upon different circumstances.

Mr. Rank: I appreciate that.

The Court: I don't think that this gentleman on the stand would want to venture an opinion about something he hasn't even seen.

Mr. Rank: No, no; he definitely will not. I mean he doesn't know that.

Q. (By Mr. Rank): Just one other question, Mr. Kilpatrick, one other matter. During the course of your operations, have [871] you logged-over land that had been cruised by E. P. French?

A. Yes.

Q. Percy French? A. Yes.

Q. You are familiar generally with Percy French cruises?

A. Yes. We bought some property that he had cruised and we have logged part of it.

Q. And what has your experience been as to the percentage of recovery of the French cruises?

Mr. Phelps: Well, now, I will object to that, if your Honor please. His experience in other places, other logging conditions, other terrain——

The Court: Well, that is not an issue in this case.

Mr. Phelps: It has no bearing on any issue here.

Mr. Rank: That's all. That's all then.

The Court: Anything that you wish to ask further?

(Testimony of Frank C. Kilpatrick.)

Mr. Phelps: May we take our recess? There may not be any, but I want to discuss the matter with counsel.

The Court: All right; we will take our recess now.

(Short recess.) [872]

Mr. Rank: If the Court please, with the Court's permission, may I ask this witness one more question?

Q. (By Mr. Rank): Mr. Kilpatrick, assuming the following to be true: A 1,961-acre tract of logged-over lands in Township 2, Range 1 Northeast, I believe, Humboldt Meridian—at least the lands we are referring to here—containing a residual footage as follows—That is these logged-over lands: A total of 37,058,941 feet broken down as follows: 13,935,172 feet of standing redwood; 2,289,894 feet of standing douglas fir; 14,996,000 of redwood logs; 1,613,015 feet of redwood chunks; 3,915,456 feet of fir logs; cruised as follows: All standing timber that was merchantable, logs down to ten inch diameter and ten feet in length for milling purposes and 30 inches in diameter to six feet for split products, pickets, posts, shakes, and so on; where the logging operations have been clean and where the salvage operation would be primarily by a small mill, portable or semi-portable equipment required to be light and fast, of either a band sawmill or Scraggs-type mill, but entirely predicated upon a light, fast operation.

(Testimony of Frank C. Kilpatrick.)

Now, assuming those facts, can you formulate an opinion as to the per-thousand value of the remaining logs and timber on that land?

The Court: At what time?

Mr. Rank: As of May 12th, 1954. [873]

Mr. Phelps: Objected to, if your Honor please, without foundation, incompetent, irrelevant and immaterial; without foundation in these respects, if your Honor please——

Mr. Rank: Before you make your objection, I think it would be better if I add one further factor, Mr. Kilpatrick. The roads all in from the previous logging operation. I think that should be in the question. Go ahead.

Mr. Phelps: The objection is that it is without foundation; first, that the witness is not qualified to testify as to value, market value now, of such lands as he has already testified he knows of no market value or sales of any salvage operations whatsoever; secondly, that it appears affirmatively that the only basis that he has to arrive at such an opinion and conclusion would be on the basis of the experience of salvage operations, which is precisely the point that was involved in the testimony of the first witness—what could be recovered from it, what it would cost, and what the profit would be; thirdly, that there is no showing that the witness has any knowledge of the lands involved, and that the factors that he has already testified to that must be taken into consideration go beyond merely the cold expression of footage figures in a hypothetical ques-

(Testimony of Frank C. Kilpatrick.)

tion, but involved beyond that the question of the nature of the equipment, the length of the chunks, and we know that from the other testimony, that the question of the market in that area is [874] involved—what you can sell for, for instance, if you make this addition: What the log haul costs would be in that particular area as distinguished from another area. All those things enter into this; this isn't a question of simply market value from experience of sales. Furthermore, on the ground that before the witness can express an opinion as an expert on that, there must be a showing in fact that he has actually examined the land, and indeed, in some of the cases——

The Court: We don't need a hypothetical question if he examined the land.

Mr. Phelps: That is right, and he should have made an examination of the land to determine the manner in which it would be logged, the terrain—the terrain makes a tremendous difference, as Mr. Rank well knows—and because of the leaners and what is in evidence otherwise.

The Court: You may be premature. The witness may say on the basis of these facts, he couldn't give an opinion; we don't know yet.

Mr. Phelps: I think I can presume from the recess that he is prepared to say something, and I don't think it is proper and I don't think that he is properly qualified and I don't think it has the proper foundation. And I will say this to your Honor—and I don't say this in any term except

(Testimony of Frank C. Kilpatrick.)

that I want your Honor to keep this in mind: That your Honor [875] made no ruling or I made no offer of proof—let's put it that way—but when Mr. Cobb was on the stand, I personally averted asking him his opinion as to the value of that stumpage that he himself had cruised, and I did it because—and he was prepared to testify to a value, Mr. Cobb was, and I did it because your Honor had indicated, and I tried to realize, and I didn't make the offer, so the record doesn't mean anything.

But the fact is that I did it because your Honor had indicated that we are concerned with sales, market value, what will a willing purchaser pay.

The Court: Mr. Cobb said \$7.00 per thousand.

Mr. Rank: No.

Mr. Phelps: No; he didn't.

Mr. Rank: That was Mr. Wilson.

The Court: Oh, Mr. Wilson. Excuse me, Mr. Wilson did.

Mr. Phelps: No. And this witness knows less about it than Mr. Cobb.

Mr. Rank: Oh, well——

The Court: I would be inclined to say that the witness was qualified to give an opinion on a hypothetical basis. I don't know how much value would attach to it. But this is a field in which the Court has had a great deal of experience in condemnation cases, and just so that neither side will be dissillusioned, it is a familiar pattern to the Court. [876] On one side there is always, or usually is a great enthusiasm as to value; and on the other side there

(Testimony of Frank C. Kilpatrick.)

is a great minimization as to value. And I have heard that time and time again through a parade of witnesses over the years on valuation proceedings. So you can take it for granted I am pretty blasé on that subject.

Mr. Phelps: I submit so far as the value to be placed on it, it is approximately what can be gotten from it on a free market.

The Court: I will overrule the objection.

Mr. Phelps: I don't think that we have entered into it in the same way that your Honor's experience has been in condemnation cases. We are in equity and we have tried to produce a true picture, and we have not been, as your Honor has indicated——

The Court: That is what the Court is going to have to do, and I may not find myself in agreement with either side.

Mr. Phelps: I just wanted you to know, your Honor, because of your Honor's remarks, so far as we are concerned we didn't try to puff it up. But I have tried to present to your Honor the true facts.

The Court: I will overrule the objection.

Q. (By Mr. Rank): The question was, are you able to formulate an opinion based upon those facts?

The Witness: Well, based upon what you read, that is a [877] typical salvage operation. It always has to be conducted on that basis—those sizes of recovery and the equipment and all of that. The only

(Testimony of Frank C. Kilpatrick.)

thing—we have valued our own lands, but the stand is less than on the lands you mentioned; so I would think that the salvage or the recovery cost would be less on account of the heavier stand. And I know for a fact that our figures are between three and four dollars. I have gone over that definitely. We expect to put in a salvage mill very soon. With the heavier stand that you indicate there, I would think that the value with more redwood than we have would probably be a dollar to a dollar and a half more, less logging costs.

Q. In other words, then, your opinion of the value of this logged-over land would be four and a half to five and a half dollars a thousand, is that correct?

A. Based on our own survey and what you have given the figures. May I say, I believe you said——

Q. A dollar or a dollar and a half more?

A. Yes.

Q. It would be four to four-fifty, to five to five-fifty?

A. Yes.

Mr. Rank: Thank you. That is all. [878]

Mr. Phelps: Your Honor understands my objection runs to the entire line of the cross-examination although I didn't interrupt each question?

The Court: Very well.

Mr. Phelps: Again may it be understood that I am doing this only because it has been gone into on direct, with respect to salvage.

(Testimony of Frank C. Kilpatrick.)

Cross-Examination

By Mr. Phelps:

Q. Mr. Kilpatrick, do you recognize that there is a difference in the quality of redwood timber in Mendocino County as compared to Humboldt in this area? A. No.

Q. None? A. None.

Q. What percentage of clears do you get out of the stand in Mendocino County?

Mr. Rank: Just a minute. To which we object——

The Witness: Wait a minute. You talk about the quality. Our clears are just as good as Humboldt clears.

Mr. Phelps: If it is a trick answer, would you explain the trick?

Mr. Rank: I don't think it is a trick answer. I object to that.

Q. (By Mr. Phelps): I am not a logger. Will you explain what [879] you mean? Withdraw it. I will ask you the question: Do you recognize that the redwood in Mendocino County will not cut out to the same quality that the redwood in the Humboldt-Del Norte area will?

A. To a certain extent, yes.

Q. You recognize, do you not—well, let me ask you this: What percentage of clears do you cut out in the timber that you are experienced with?

A. It depends entirely upon whether you are logging selectively or logging clean.

(Testimony of Frank C. Kilpatrick.)

Q. Assume a normal logging operation, what has your experience been?

A. Well, it runs, in Mendocino County, some 50 to 60 per cent. Of clears you said?

Q. Clears. A. Clears only?

Q. Yes.

A. Oh, say 30 per cent—25 to 30 per cent.

Q. When you arrived at this figure—first we will come to the virgin timber—of 300 thousand dollars, did you do that on a per-foot basis?

A. Well, taking everything into consideration and based on this sale to Hammond, which had a good deal to do with it—

Q. Never mind the sales; I am not opening up that question or getting into that with you. I am asking you, sir, if you [880] arrived at this by calculating the question in terms of dollars per thousand?

A. Well, it probably works back to that, yes.

Q. All right. Now what figure per thousand did you use?

Mr. Rank: He didn't testify he used a figure per thousand; he said it worked back to it—it could be worked back to it. He didn't testify he used a per thousand figure.

Q. (By Mr. Phelps): What, if anything, did you in your mind use as a per thousand basis?

Mr. Rank: We will object to that as assuming something not in evidence. The witness has not testified—

Mr. Phelps: The question was, "if any."

(Testimony of Frank C. Kilpatrick.)

The Witness: How is that question again, please?

Q. (By Mr. Phelps): What figure, if any, did you use as a per thousand basis to arrive at the figure of \$300,000?

A. I used the lump sum figure on the Hammond sale as compared with the total footage.

Mr. Phelps: I will ask that that answer go out.

The Court: Did you use a per thousand basis for the valuation of \$300,000? That is what he wants to know. Did you arrive at that figure on a calculation——

The Witness: Yes.

The Court: ——that availed itself of so much per thousand feet?

The Witness: Yes, I did; but there are other things involved than just [881] the per thousand on the totals.

Q. (By Mr. Phelps): What was that per thousand figure that you used?

A. Well, if the three hundred million feet were sold at three million dollars, including——

Q. No, no; now you answer the question.

A. Now just a minute. Let me understand these questions, please.

Q. You are talking about three hundred million feet. Let's get back to the question. How many million feet on these 14 forties you were considering?

Mr. Rank: Do you know the property he is talking about now, the 14 forties?

(Testimony of Frank C. Kilpatrick.)

The Witness: I saw it this morning on a map I had in my office, about 33 or 34 million feet of redwood, and six or seven million feet of fir.

Q. (By Mr. Phelps): In arriving at this \$300,000 what figure per thousand, if any, did you use on that cruise basis to arrive roughly at this figure of \$300,000? A. About eight dollars.

Q. Did you make any differential per thousand between redwood and fir? A. No.

Q. So far as you are concerned, you would consider that the value of stumpage of redwood and fir then would be the same? [882]

A. No; they average out. We usually handle it that way.

Q. Which is higher, redwood or fir?

A. Well, it depends on the quality of the fir and the redwood; you can't say that arbitrarily.

Q. We are talking about this particular area, these 14 forties.

A. I don't know how many peeler logs there are in it; I don't know how many fir logs there are. All of those things enter into the value of fir and redwood.

Q. You really don't know then the quality of this timber on the 14 forties?

A. Not that exactly. I know some of it around there.

Q. But you had never been in on this particular land, had you?

A. I don't know; I have walked up through part of that country.

(Testimony of Frank C. Kilpatrick.)

Q. You said you walked up through part of that country; you told us that you had been within a mile of there. What road did you use when you got within a mile of there two years ago?

A. I didn't say I had been there two years ago.

Q. I thought you said you had been within a mile of that area two years ago.

A. No; I don't think so. I was in the Sage timber; I don't know whether it is a mile or how far it is. I said it might have been a mile or [883] two.

Q. Well, when you went the closest that you did two years ago to these lands, what road did you use?

A. The California Barrel road.

Q. And at that time were they within a mile of this land? A. I don't know.

Q. All right. Now in Mendocino County do you recognize that there is a difference in valuation of stumpage in Mendocino County as compared to Humboldt County on a per footage basis?

A. Yes, I believe there is.

Q. And the price that you are giving of eight dollars a thousand is around the average stumpage price in Mendocino County today for redwood?

A. Well, there have been higher sales and lower sales in Mendocino County.

Q. You recognize there have been some sales in Mendocino County as high as twelve dollars and sales in Mendocino County the average price would be about eight dollars?

(Testimony of Frank C. Kilpatrick.)

A. No, eight dollars is the highest we have paid for any of it. We have bought quite a bit of it at six, six-fifty and seven.

Q. I am talking about within the period around May, 1954?

A. Well, our last purchase was the first part of this year, just prior to that time—it was around six dollars.

Q. Going on up into the, into Humboldt County, you recognize that there is about \$6 difference in stumpage on a thousand [884] basis, is there not?

A. I don't know.

Q. Do you recognize any difference between Mendocino County and Humboldt County or do you know whether there is any difference?

A. All I can base that on is this Hammond—this Geneva deal.

Q. Let's come down to that. Your testimony is based on one sale?

A. No, I am basing it on sales in Mendocino and Sonoma Counties as well.

Q. In Humboldt County are you basing it on just one sale?

A. Well, that is the only recent sale I am familiar with.

Q. And that sale of Hammond Lumber Company or the Geneva Mill, as long as you have brought it out, let's go into that and see what you do know about it.

Did you know with respect to that sale that it also included a sawmill? A. Yes.

(Testimony of Frank C. Kilpatrick.)

Q. And did you know that the over-all price was calculated, because it did include a sawmill?

A. I don't know. I read it in the California Redwood Association Bulletin; that is all I know about it.

Q. All you know then is that this isolated sale which appeared in some bulletin gave that figure? [885]

A. It was in the newspapers, too.

Q. All right. Did you know that that was a pressure sale?

Mr. Rank: Just a minute.

Mr. Phelps: I am cross-examining this witness.

Mr. Rank: Wait a minute. Well, yes, but you are assuming something not in evidence. There is no testimony showing that it was a pressure sale.

Mr. Phelps: I can ask him in testing his knowledge of this sale if he is basing it on that fact.

The Witness: No, I didn't know that.

Q. (By Mr. Phelps): Did you know that the Geneva Mill had to pay Sage Land & Lumber Company off, they were in default, and that they made this deal with Hammond in order to do that? Did you know that?

Mr. Rank: To which we will object as assuming something not in evidence.

The Witness: I didn't know that.

Mr. Phelps: This is cross-examination.

Q. Did you know that?

A. No, I did not.

(Testimony of Frank C. Kilpatrick.)

Q. Well, let's see what else you know about some sales up in there.

The Court: Just ask the question, Mr. Phelps.

Mr. Phelps: All right, sir.

Q. Did you know about the sale of the Bull timber? [886]

Mr. Rank: Just a moment. To which we will object——

A. I am not familiar with it. I know that it was——

Mr. Rank: Just a minute, please, Mr. Kilpatrick. Objected to as assuming something not in evidence. There is no evidence showing that there ever was a sale of the Bull timber.

Mr. Phelps: Your Honor, I am entitled with an expert to cross-examine him as to his knowledge of other sales—it is a cardinal principle to test his knowledge, sir.

Mr. Rank: Before he can ask the question there must be a showing or some facts in evidence, showing that there was such a sale.

The Court: If he doesn't make the showing, it doesn't mean anything.

A. I am not testifying as an expert. I don't claim to be an expert at all.

Q. (By Mr. Phelps): You don't claim to be an expert, on the value of timber in Humboldt County; is that the fact?

A. I claim to have done a lot of it, but I wouldn't classify myself as an expert.

(Testimony of Frank C. Kilpatrick.)

The Court: A lot of men are not as modest as that.

Mr. Phelps: I beg your pardon?

The Court: A lot of witnesses I have heard testify are not as modest as that. They all say they are experts.

Q. (By Mr. Phelps): So it boils down to this: That your [887] estimate of value is based entirely on Mendocino County plus this report that you read in some bulletin of a sale to Hammond Lumber by Geneva Mill?

A. No, I have kept track of some of the other sales; part of the Merriam timber, part of the Northern Redwood timber. The redwood area is pretty much the same all the way through, so we have to watch the northern end as well as the southern end.

Q. Do you know the bull timber?

A. Yes, I know where it is, yes.

Q. Did you know that has been sold within the last month for \$1,480,000, one hundred and thirty million feet on a cruise, or a little over \$12 a thousand, in that same area?

A. I read in the paper it had been sold, but I didn't know the figure.

Mr. Rank: Just a moment. What is your figure on that?

Mr. Phelps: One million four hundred eighty thousand.

Mr. Rank: How many feet of timber?

Mr. Phelps: One hundred and thirty million.

(Testimony of Frank C. Kilpatrick.)

Mr. Rank: That doesn't come to \$12, Mr. Phelps; it comes to a fraction over ten.

Q. (By Mr. Phelps): You just read about that sale, then? A. Yes.

Q. All right. Did you know that the quality of that Bull timber is not as good as the quality in these 14 forties? [888]

A. It was awful pretty timber; it looked good to me.

Q. Did you know that it was only 29 per cent redwood, 4.1 per cent cedar, and the balance fir?

A. I did not.

Mr. Rank: If the Court please, I think that counsel should, in addition to talking about the total price paid, also give the witness the conditions, such as the amount of the down payment, whether it was for cash and what the terms were. There are a lot of factors that go to make up an over-all purchase price.

Q. (By Mr. Phelps): Did you know that there were no roads——

Mr. Rank: Just a moment. Do I understand that the Court said that unless it is established that there was a Bull sale that this testimony would be excluded? Or what was the statement on that?

Mr. Phelps: I am just testing his knowledge.

The Court: I made a general statement to you gentlemen before that I am not a novice at this, and I merely suggest that you don't need to waste too much time on this because of the fact that it is ob-

(Testimony of Frank C. Kilpatrick.)

vious, as the testimony now stands, since this is not a valuation proceeding——

Mr. Rank: That is right.

The Court: At the present moment one side claims a value here of about twice as much as the other side. In any event, the amount by which the minimum valuation would exceed the [889] balance due on the contract runs well over three hundred thousand dollars. So I don't see any particular reason for spending a lot of time trying to have the Court make some finding as to the precise valuation involved, because in any event, being just a poor judge, \$335,000 is still a large sum of money, and whether it is 335 thousand or 500 or 880 thousand dollars, insofar as the determination of this case is concerned, is only a matter of proportion. So I merely suggest that to you, that you don't have to try this case as if it were a valuation case. [890]

Mr. Phelps: Well, I appreciate that.

The Court: I am not telling you something that you——

Mr. Phelps: Well, Your Honor, the only reason I think this is material, and I will cover it more quickly now, is this, that obviously they have—and it is my position and I want to show this, that this man isn't qualified, has no knowledge.

The Court: Well, I am inclined to disagree with you on that, Mr. Phelps, but this is not an evaluation proceeding. I think that the testimony of a man who was engaged in this business and who knows something about the area is entitled to some

(Testimony of Frank C. Kilpatrick.)

weight, at least he is entitled to weight, let's say, against the testimony of interested parties. And while it might not be strictly accurate and while we might show that there are factors that might make it different in some instances I think that the witness is qualified to give some opinion concerning the matter from his general experience as a man engaged in this business.

Mr. Phelps: Well, I want to——

The Court: It may not be—all of the factors may not be taken into account, and on a precise analysis of the valuations, he not having seen the property, there might be a substantial variance between his figures and those given by Mr. Wilson, for example. Wilson says it is \$15 per thousand and he gives a figure that is about \$8 per thousand. He may be [891] minimizing and Mr. Wilson may be more enthusiastic in his valuation. But since we are not engaged in a valuation proceeding, I don't see that we need to, counsel need to spend much time, because for the purposes of this litigation, \$335,000 looms just as important in my mind as \$885,000. It is still a lot of money.

Mr. Phelps: It is a lot of money.

The Court: And so I don't know why we have to engage in too much controversy over it.

Mr. Phelps: Well, I will try not to engage in too much, but——

The Court: Your opponent is not disputing with you that the property has value over and above the

(Testimony of Frank C. Kilpatrick.)

amount of the balance of the purchase price. You are in dispute as to what that precise value is.

Mr. Phelps: I think, if Your Honor please, that in testing this witness' credibility and knowledge——

The Court: Well, I have talked too much on it. I have just—suppose you——

Mr. Phelps: Well, all right, let me go on, then.

The Court: I am not doing this for the purpose of dissuading you from asking any question, but just so you are not in the dark. A lot of judges sit with a stone face and you are in the dark and don't know where you are going.

Mr. Phelps: I appreciate that, Your Honor, so I will [892] hurry along and about just one other thing——

Q. (By Mr. Phelps): Did you know of a sale of land just yesterday that was put up for sale by the U. S. Bureau of Land Management, fir, in the Township 5 South, 3 East, 216 thousand feet, no roads, no access, of inferior quality fir, and the Forestry Service, the U. S. Bureau of Land Management, placed minimum bids as of yesterday of \$11.50? Did you know of that transaction?

Mr. Rank: Is that a sale that has been completed?

Mr. Phelps: Yesterday it was completed, yes, on a minimum bid of \$11.50.

Mr. Rank: 213 thousand feet?

Mr. Phelps: 216 thousand.

Mr. Rank: 216 thousand feet.

(Testimony of Frank C. Kilpatrick.)

A. I didn't know about that.

Q. (By Mr. Phelps): You didn't know about that. All right. Did you know that there are eight more forties that the Bureau of Land Management has put up for sale in that area of fir and have again placed a minimum bid of \$11.50 per thousand?

A. I haven't been much interested in those since we tried to buy some land from the Bureau of Land Management and their ideas of values were too much for us.

Q. All right. Now you said that you didn't know of any sales or transactions dealing in logged-over lands. Am I correct in what you have told us? [893]

A. No, I know of no sales.

Q. Do you know anything about the Wolf Creek Logging Company, which is across the road and just west of here in this general area, down where that is, just west of the highway? Do you know about the Wolf Creek holdings?

A. The Wolf Creek Lumber Company has a mill just north of Rockport. I don't know about their northern holdings.

Q. Do you know that the Wolf Creek have been selling off portions of their land, giving rights to cut on a re-log basis and salvage basis at \$10, an average price of \$10? A. No.

Q. In that area? Did you know that the minimum price that they have accepted has been \$6 on a per thousand basis? A. No.

Q. And that was several years ago. Did you

(Testimony of Frank C. Kilpatrick.)

know that Harold Weaver, who has a contract with Wolf Creek, has an arrangement under which he splits with Wolf Creek everything they sell over \$6 on a logged-over basis?

Mr. Rank: Just a moment, if the Court please. May I have that question?

The Court: That is a little too complicated, counsel.

Mr. Phelps: All right.

Q. But you don't know anything about that, is that right?

A. No, not about that particular one, no.

Mr. Phelps: I have no other questions, Your Honor. [894]

Mr. Rank: No further questions, Mr. Kilpatrick, thank you.

The Court: That's all.

(Witness excused.)

Mr. Rank: I have just one question to ask Mr. Wilson. Maybe we can take him now and then have the noon recess.

The Court: All right.

Mr. Rank: Mr. Wilson, will you please take the stand?

A. K. WILSON

was recalled as a witness on behalf of the defendants herein, who having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Rank: Counsel just stated there is no question about the identity of these documents, and so— Did I understand you correctly?

Mr. Phelps: That's right, but on the question of materiality——

Mr. Rank: That's right, I understand that.

Mr. Phelps: Yes.

Mr. Rank: If the Court please, we offer in evidence an assignment dated September 29, 1947, of the Union Bond & Trust interest in the Sage "B" contract, the Sage "B" lands that we are talking about.

The Court: 19 what? [895]

Mr. Rank: '47. To Ah Pah Redwood Company, together with two other assignments and consent to assignments, involving Union Bond & Trust, International Pacific Pulp & Paper Company, and the Ah Pah Redwood Company, and showing that in September of 1947, pursuant to previous transactions, Union Bond & Trust assigned and transferred all of its interest in these Sage "B" lands to the Ah Pah Redwood Company, which is in turn owned by the International Pacific Pulp & Paper Company.

Mr. Phelps: Well, I don't see any materiality to this.

(Testimony of A. K. Wilson.)

The Court: Do you need the witness for that?

Mr. Rank: No, no, don't need the witness for that. There's no question as to the identity of the document.

Mr. Phelps: No question about the identity of it.

(Witness excused.)

The Court: This is an assignment of Union's interest in its contract with Sage?

Mr. Rank: Yes, involving all of these lands that they have been talking about, lying east and west of the Blue Creek lands. In other words, the record so far appears that the Union Bond & Trust has been the owner of those lands and owner of that contract at all times, and so we want to show what transpired.

The Court: Well, what significance has it in this matter?

Mr. Rank: It has significance in three matters. There is, Number One, a possibility of the Court considering in an [896] equitable decree some sort of a right-of-way. There is a possibility of that, over the Ward lands, on behalf of the Union Bond & Trust Company.

Another matter is the question of damages, the right of Union Bond & Trust to interfere with their logging on the Sage lands.

Another matter is, of course, the question of damages by interference with the logging.

So it is material in two or three regards, two or three matters.

Mr. Phelps: But it isn't material, if Your Honor please, and doesn't establish the whole picture.

Mr. Rank: Well, if you want to establish anything else, you establish it.

Mr. Phelps: No, no, Mr. Rank, don't offer part of it, when particularly you were the attorney in this matter.

Mr. Rank: Oh, no, I wasn't, oh, no. No, I had not a thing to do with this and don't——

Mr. Phelps: Well, at any rate, whether you did or not——

Mr. Rank: Not a thing to do with that.

Mr. Phelps: Whether you did or not, it is also true, is it not, that there was a cutting contract entered into between Ah Pah and Union, so that Union is cutting under a contract?

Mr. Rank: Frankly, I don't know, Mr. Phelps. I obtained [897] a copy of such a document, but I don't know whether it was or not.

Mr. Phelps: Well, I don't see any materiality and I object that it is incompetent, irrelevant and immaterial and without foundation.

The Court: I will admit it subject to its being connected up in some manner.

Mr. Phelps: All right.

The Clerk: Defendant's Exhibit AL introduced and filed into evidence.

(Whereupon assignment documents referred to above were received in evidence and marked Defendant's Exhibit AL.)

Mr. Phelps: AL?

The Clerk: That's correct.

Mr. Phelps: Thank you.

Mr. Rank: Shall we take our noon recess now, Your Honor?

The Court: Yes. You are going to be able to put on the rest of your witnesses this afternoon?

Mr. Rank: I have one witness only, just to clean up matters—Mr. Ward—and that's all I am going to do. I am going to try to go fast with him.

The Court: I just wanted to find out. Two o'clock.

(Whereupon, an adjournment was taken until 2 o'clock p.m. this day.) [898]

December 1, 1954—2:00 P.M.

Mr. Rank: Mr. Ward, will you take the stand, please.

HAROLD L. WARD

recalled as a witness on behalf of the defendants, being previously duly sworn, testified as follows:

The Court: You have been sworn, Mr. Ward. Please take the stand.

Direct Examination

By Mr. Rank:

Q. Mr. Ward, very briefly, would you just give a history of the Ward family's acquisition of the ownership of the redwoods and how it finally ended up in the two corporations?

(Testimony of Harold L. Ward.)

The Court: The stock ownership?

Mr. Rank: Yes, briefly.

The Witness: My grandfather bought a large tract of redwoods up there on the Klamath in 1897. A few years later, my father also bought some further redwood lands in the neighborhood of his own. The lands that my grandfather bought passed on to his heirs and successors and later came into the company called the Ward Redwood Company, and the lands that my father bought passed on to his heirs, and came into the company called the Blue Creek Redwood Company, which dissolved in 1952.

Q. (By Mr. Rank): And the stockholders of the Blue Creek [899] Redwood Company are now all the personal very individual defendants and cross-complainants in this case?

A. That's right.

Q. What percentage of stock ownership do these people hold in the Ward Redwood Company?

A. About 18 per cent.

Q. And the balance is owned by the other heirs?

A. Yes. Some of them are not even heirs.

Q. Mr. Ward, I show you a folder of correspondence that is marked Defendant's Exhibit F for Identification, and ask you if you can identify that correspondence as various letters, wires and exchanges between you and Union Bond and Trust Company or Mr. Fletcher and Union Bond and Trust Company for the period—the first letter being

(Testimony of Harold L. Ward.)

June, 1946, and I believe it goes down to a letter in the latter part of 1953?

A. Yes, June 25, '46, down to October 1, '53.

Mr. Rank: Yes. If the Court please, we will ask that these be marked Defendant's Exhibit F in evidence.

Mr. Phelps: If your Honor please, there is a file here of letters——

The Court: Just a moment. That was marked at the pre-trial "F"?

Mr. Rank: Yes, pre-trial F.

Mr. Phelps: For Identification.

Mr. Rank: Yes. [900]

Mr. Phelps: As I have stated to Mr. Rank, we certainly have an objection as to the materiality of this material put in as a lump like this. It is meaningless for the record; it has nothing to do with the particular June to October; in fact, everything relating to the default that we are interested in here has been pulled out of this file and what it is is selected material—it isn't a complete file, but it is selected material over the years relating to other matters, other conditions, logging practices, other amounts of payments which have been cured, and so forth. I can't see any purpose it serves in this lawsuit except to require me to go over it document by document, I suppose, to protect the record.

Mr. Rank: I gave you a copy of that folder.

Mr. Phelps: You did, yes; I am making no point of that.

Mr. Rank: At the time of the pretrial confer-

(Testimony of Harold L. Ward.)

ence, and it doesn't relate, except maybe incidentally, to anything other than the matters of payment and matters of that type.

Mr. Phelps: All of which are ancient history and have been cured.

Mr. Rank: We submit, if the Court please, that that is a very material matter to have before your Honor; in other words, relations of the history between these two people that finally led up to this particular matter. We are also going to offer in evidence all of the default notices since January, [901] 1950. We offer them for two purposes: One, of course, to show the fact of the defaults and the fact of the notice, and then on the question of waiver. The default notices, each and every one, contain provisions which definitely provide they are not waiving any other default, and so on.

The Court: I can see the materiality of the last documents that you have described, the default notices; but I am just wondering how are we going to appraise this apparently voluminous file.

Mr. Rank: It isn't a voluminous file, if your Honor please, compared to what we have offered. You can see the quantity of letters and wires. It is my purpose and plan to simply go through it and call out various passages here and there.

The Court: Why don't you do this in order that there will be some record upon which the Court can rule and upon which your opponent can make proper objections? Why don't you leave it marked for

(Testimony of Harold L. Ward.)

identification and call attention to what you want to include in the record so that I can see the materiality of it at the time?

Mr. Rank: Yes.

The Court: If you are going to put this in the record, I don't know what will happen.

Mr. Rank: I appreciate that, and I will do that. The only thing is I will have to be a little more in detail than [902] I otherwise would.

The Court: I don't know how you can help that.

Mr. Rank: Yes.

The Court: If you regard it as material you have to present it in some way so that I can see that it is and so that your opponent can see that it is.

Mr. Rank: Yes. I will go through it and call a portion of it to the Court's attention. There were certain questions I was going to ask the witness anyway on various matters contained in here.

The Court: Then that gives your opponent a chance to object.

The Clerk: Do you want to mark this for identification?

The Court: It is already marked for identification.

Mr. Rank: No, that is on the pre-trial.

The Court: Mark it F for Identification in this trial.

The Clerk: Defendant's Exhibit F, marked for identification.

(Testimony of Harold L. Ward.)

(Whereupon correspondence file referred to above was marked Defendant's Exhibit F for Identification only.)

Q. (By Mr. Rank): Mr. Ward, under the contract May 1st, 1946, as I recall the record now, the contract together with other documents was forwarded to Mr. Wilson about May 2nd, 1946, and do you recall about when you had returned to you signed by [903] Mr. Wilson?

A. It was the latter part of May.

Q. And if you will recall, the contract called for a down payment of \$25,000, and I ask you if that down payment was paid at that time?

A. No, it was not.

Q. And did you subsequently have a phone conversation or talk with Mr. Wilson about that?

A. Yes.

Q. What was that, just briefly?

Mr. Phelps: It seems to me, if your Honor please, that that is beside the issues of this case, it is incompetent, irrelevant and immaterial. There is no question that the \$25,000 was paid; there is no question that a note was given and interest on the note was paid. But what difference does it make to this lawsuit at this time? We have stipulated as to the total amount on pre-trial conference that was paid, and we are going down avenue after avenue of ancient history over the period of five years and we are not going to finish——

(Testimony of Harold L. Ward.)

Mr. Rank: I am not going to take very much time on this, Mr. Phelps.

Mr. Phelps: I submit it has no materiality.

The Court: I am wondering what the——

Mr. Rank: My purpose was to show—and right away at the very start I know counsel doesn't like to have me do it [904] because it gets it in the record—my purpose is to show that right at the very start that where the contract called for the payment of \$25,000, that Mr. Wilson got Mr. Ward to take a note for six months for that, and instead of it being paid is six months, it was not paid until some two or three years later.

Mr. Phelps: With interest.

Mr. Rank: It is my program to show that first incident right at the very start and then to show various other instances of defaults and where Mr. Ward agreed not to give Mr. Wilson a notice for awhile, but to try to play along with him; then without default notices, there would be no payment.

The Court: But the parties did proceed along those lines.

Mr. Rank: Oh, yes, but if the Court please, that is all very important to show whether it was wilful or not. The past dealings under the contract are very material in determining what the state of mind or frame of mind of the purchaser was at the time of the default. In other words, it is very material too, whether it was a wilful default or purely an innocent mistake.

(Testimony of Harold L. Ward.)

The Court: How is what happened in the past going to indicate that?

Mr. Rank: It is indicative. If, for example, there had never been trouble between these parties at all, if Mr. Wilson had [905] completely, one hundred per cent, performed his contract, lived up to every term and provision, made every payment at the time it was supposed to be made, then all of a sudden there came along this present June to October incident, very assuredly the Court would look very kindly upon the purchaser in that regard, and might say, "Here we have a man who has lived up to his contract and done everything he could; very probably this was a mistake." Whereas, on the other hand, if you have a condition of continued defaults, and continued failures and continued violations of that type, then the Court can very easily say, "This carries right along." And the cases are that way; where you have a continuing performance that you are looking at, the cases take into consideration the performance of the parties charged with default, in determining whether or not they were in bad faith or wilful, so the question might be before the Court to decide. I think it is material for just what I have stated. If you have just one item——

The Court: I understand you.

Mr. Phelps: If your Honor please, if there were any claim of a similar occasion when there had been a failure to report or a mistake in the reporting such as we are dealing with here, then I could see counsel's purpose. And all this would tend

(Testimony of Harold L. Ward.)

to show is no more than what already has been established in the evidence. They say he didn't make payments [906] on time, but he was always within the grace period. There never has been such a payment, as Mr. Ward testified on direct examination, on examination from me, that there never was any occasion to question the accuracy of their reports before that. Mr. Fletcher was quite insistent on that. So that this has no bearing on what your Honor has to decide, and what it means, I suppose, if I am to do a fit and proper job, is I would have to then go back and go into the circumstances of all those other matters. But I don't think your Honor wants to do that. I don't think your Honor should do that, and I don't think counsel should be in a position to require us to do that.

The Court: Isn't the record sufficient already, Mr. Rank? The testimony of Mr. Wilson was that consistently he took advantage of the grace period, as he himself said.

Mr. Phelps: Yes.

The Court: Because of lack of funds, and you proved numerous extensions and so forth, and that he was consistently advantaging himself by making late payments all along.

Mr. Rank: Well, it goes beyond that. May I then go into one wire that will be admissible? It is a wire we examined Mr. Wilson about when he testified as to the fire damages. If you recall, he said, "Why don't you read the rest of the wire?" I don't know whether you recall that, but may I read from that

(Testimony of Harold L. Ward.)

wire and our response to the wire. I will make an [907] offer of that separately, and if we cannot offer the rest of these, that will give you an example of the type of matter that we have in mind.

The Court: You see, Mr. Rank, I think Mr. Phelps is right. If you want to take up *seriatim* various incidents occurring in the past as to the relationship of the parties and the conduct of Mr. Wilson with respect to his strict observance of the terms of the contract, that the other side would have a right to go into each one of the incidents and present such evidence as they feel might be proper to show that there was some reason or that the Court ought to know all the circumstances of these various incidents, and then the Court would end up then with the problem of trying to mark the defendant as he would be marked in school, A, B, C or D as to his conduct in performance of the contract.

Mr. Rank: I appreciate that. Maybe I can——

The Court: I am wondering if this is of any particular help.

Mr. Rank: Maybe I can shorten it and take just one incident or maybe two and shorten the whole thing that way, because this is some correspondence that we want in for another purpose anyway.

The Court: All right.

Q. (By Mr. Rank): Mr. Ward, I show you three wires, one from Mr. Wilson to Mr. Fletcher, your wire in reply to that—you [908] received a copy of that apparently—and Mr. Wilson's reply to your last wire, and then a letter of yours of Sep-

(Testimony of Harold L. Ward.)

tember 12, 1952. Will you identify those as all having been sent and received?

Mr. Phelps: I will stipulate to that; there will be no question about identification.

Mr. Rank: If the Court please, I believe the Court has in mind the portion that I read when we were talking about the fire damage yesterday. May I read you the balance of that wire—this is a wire from Mr. Wilson to Mr. Fletcher. The date of this is August 15, 1953.

“Confirming our conversation we will bring our payments current and keep them current as soon as possible. As I told you over the phone, we had our choice several years ago of building large modern plants capable of handling redwood clear through to the finished product or it would have been extremely difficult for us to have survived in the redwood business. It was contemplated at the time I entered into the contract with Blue Creek that I would build these plants but no one thought the cost would be more than a fraction of what the actual cost has been. It was imperative that these plants be built if the timber contracts were to have been operated successfully. We have operated successfully and will continue to do so. [909] To follow this program for the past six or seven years has caused us to be short of ready cash most of the time but by selling timber in California and by bringing money into California from Oregon we now owe very little on either of our plants or equipment and are now in a position to continue operating properly.

(Testimony of Harold L. Ward.)

Our construction program will soon be completed. I appreciated your friendly attitude over the phone and your statement that there were no default notices outstanding as Mr. Ward had been trying to cooperate with us. We will not take advantage of his cooperation by not sending us default notices and on the average the money due Blue Creek Redwood Company will not be paid any faster on account of default notices having been sent. We like to keep everything current and do so whenever possible. You can expect and will receive our full cooperation on these matters * * *

And Mr. Ward replied to that as follows by wire:

“A. K. Wilson.”
and so forth.

“Thank you for telegram. Suggest you continue conversations with Lawrence since we are too far away here. All we want is to arrive at a fair settlement with minimum of expense to all concerned. Default [910] notices outstanding have been cured except for nominal discrepancy between your check and your statement on default notice of May 27th. However, payment due June 20th will be overdue sixty days on August 20th as well as payment due July 20th.

“Regards, Harold L. Ward.”

To which Mr. Wilson replied:

“I thank you for your telegram. Please advise the amount of the discrepancy between our check

(Testimony of Harold L. Ward.)

and statement referred to in your telegram and payment will be mailed at once. Had hoped to again be current in our payments to you by this week but on account of the expense of the fire, it will be a little while before we can get current. It seems like every time that we get things about worked out, something happens. The fire did very little actual damage and is a good thing as far as our over-all picture is concerned as it makes a good fire break down through the middle of the tract, but it cost a lot of money getting the fire under control and we lost eight days production in the woods and at the mill both. Expenses were more during this time while we were fighting fire than if we had been producing logs and lumber. Expect to get our stumpage account with you on a current basis shortly.

“Best regards.” [911]

Q. (By Mr. Rank): Mr. Ward, do you recall those circumstances? A. Yes.

Q. And do you recall whether you had sent default notices out for a period of time?

A. No, we hadn't been sending them since May.

Q. And for sometime prior you hadn't been sending them? A. Yes.

Q. As I recall, you hadn't sent default notices for the months of May, June and July; is that it?

A. That's right.

Q. Do you recall whether that was after a conversation with Mr. Wilson that you refrained from

(Testimony of Harold L. Ward.)

sending default notices? Do you have any recollection on that?

A. Yes; after he paid up—he was up to date for about four days in May, I think, from the 16th to the 20th, and we talked and hoped that he was going to continue up to date and we wouldn't continue to be sending default notices any more.

Q. I see. And then you received no further payment then until later in the year; is that correct?

A. That is right.

Mr. Rank: Now, a letter of September 12, 1952, from Mr. Ward to Mr. A. K. Wilson:

“Your telegram in August a month ago stated that you would see that we did not suffer by [912] reason of not sending any default notices since our default notice to you of May 27, 1952. We would like to get along without default notices if possible. It is now almost a month past the date on which we would have received our payment for logs removed in May if we had sent you a default notice in due course, as we had been doing before you put payments on a current basis for a brief period in May.

“Won't you send us the payments now for logs removed in May, June and July? The time is at hand when we will have to send you default notices again in self-defense.

“According to the reports which you have sent us, the following payments are now overdue:” May, June, July and August, \$22,437.54.

(Testimony of Harold L. Ward.)

Mr. Rank: Did you receive a check back for that amount, if you recall?

A. No.

Q. Did you have to send a default notice?

A. We did.

Q. And I believe the record shows, does it, Mr. Ward, the date that you finally receive payment of that amount? A. Yes.

Mr. Rank: This is contained in an exhibit that has a list of payments, AB, I believe. [913]

The Court: That is AB, isn't it?

Mr. Rank: Yes.

Q. (By Mr. Rank): When did you finally receive payment for those amounts of May, June and July logs? A. On December 16th.

Q. '52? A. '52, yes.

Mr. Rank: Maybe we could read briefly the dates of the default notices. I am showing you now Defendant's Exhibit AB for Identification.

Mr. Phelps: Just tell me what it is, and I will stipulate. You don't have to ask him, if you think it is material.

Mr. Rank: The date of the default notice was September 29, 1952.

We will ask that those four documents be marked in evidence, if the Court please.

The Court: All right, mark them as one exhibit?

Mr. Rank: One exhibit, yes.

The Clerk: That will be Defendant's Exhibit AM introduced and filed into evidence.

(Testimony of Harold L. Ward.)

(Whereupon documents referred to and described above were received in evidence and marked Defendant's Exhibit AM.)

Mr. Rank: I think, if the Court please, that sufficiently exemplifies the things that we have in mind in that regard. [914]

That means, Mr. Clerk, that Defendant's F for Identification is not being offered.

The Clerk: Just for identification?

Mr. Rank: Yes. Defendant's F for Identification is not being offered.

We would like at this time to offer Defendant's Exhibit H for Identification, which contains all of the default notices, the first one being dated January 13, 1952, to the date of the last one, April 21, 1954, and they include all default notices given by the Wards to Union Bond and Trust, save and excepting those that were attached to the cross-complaint.

Mr. Phelps: To which we raise the objection, if the Court please, that those have all been cured, they are all ancient history, and they are incompetent, irrelevant and immaterial and not involved in the matter before your Honor.

The Court: Well, they may have some pertinency with reference to your claims of waiver and so forth. Defendant's Exhibit H may be admitted.

The Clerk: Defendant's Exhibit H admitted in evidence.

(Whereupon default notices referred to were received in evidence and marked Defendant's Exhibit H.)

(Testimony of Harold L. Ward.)

Mr. Rank: These are two offers. We do not have the problem of time in this because they are not going to involve [915] any testimony.

I offer now Defendant's Exhibit AB for Identification, which is a schedule prepared—and it is being offered for the assistance of the Court. It is a schedule of the date of the default notices, the date received by Union Bond and Trust Company, of those notices contained in the last exhibit.

The Court: This is a compilation?

Mr. Rank: Yes, it is.

Mr. Phelps: I will submit that to your Honor's discretion.

The Court: Admitted subject to any correction as to inaccuracy.

The Clerk: Defendant's Exhibit AB admitted in evidence.

(Whereupon schedule referred to was received in evidence and marked Defendant's Exhibit AB.)

Mr. Rank: We will now offer the same type of document that is now Defendant's AC for Identification, and it is an analysis of the performance by Union Bond and Trust, as to payment records, delivery and sending out reports as required by the agreement, and is prepared from Exhibit H.

The Court: Defendant's Exhibit AC?

Mr. Rank: Yes, we offer that for the same purpose, simply for the assistance of the Court. [916]

(Testimony of Harold L. Ward.)

The Court: Admitted for the same purpose and subject to the same limitation.

Mr. Phelps: For illustration, I suppose.

The Court: Yes. It is a compilation.

Mr. Phelps: Yes.

(Whereupon document referred to and identified heretofore was received in evidence and marked Defendant's Exhibit AC.)

Mr. Rank: We ask that there be marked in evidence the two examples of pink slips which are now marked Defendant's Exhibit AD for illustrative purposes.

Mr. Phelps: No objection.

The Court: Admitted for illustration.

(Whereupon pink slips referred to above were received in evidence and marked Defendant's Exhibit AD.) [917]

Mr. Rank: We now offer Defendant's AF for identification, which is the letter from Union Bond & Trust to International Pacific, approved by Ah Pah Redwood, and it has to do with rights-of-way, which we feel was material to the matters of the existence of the right-of-way agreement.

Mr. Phelps: Well, I am not going to press it, other than to have the objection noted, if your Honor please, I don't think this is relevant to the issues of this case, as it is between International Paper & Pulp and Ah Pah.

(Testimony of Harold L. Ward.)

The Court: It is a letter from Union to one of its subsidiaries, isn't it?

Mr. Phelps: Yes.

The Court: Or one of the companies?

Mr. Rank: One of the companies Mr. Wilson testified he was president of.

Mr. Phelps: Not a subsidiary, not a company.

Mr. Rank: No, that's AF.

Mr. Phelps: We object to it as incompetent, irrelevant and immaterial, not bearing on any of the issues.

The Court: Well, I am not certain as to the materiality.

Mr. Rank: Well, I can explain what I have in mind as to the materiality.

The Court: Well, you want to show, I think I know what you are offering it for—for the purpose of, as sort of a verification of the statements—as sort of a—in a manner [918] of speaking, contradiction of the belief expressed, opinion expressed by Mr. Wilson as to the nature of his rights-of-way.

Mr. Rank: That those always existed, I mean, that the agreement was in effect.

The Court: For what it is worth, it may be admitted.

Mr. Phelps: I don't think it accomplishes that, but I shan't—

The Court: Well, it may not have any weight, it may be subject to argument. I don't think it need be determined on the basis of admissibility.

Mr. Phelps: All right, your Honor.

(Testimony of Harold L. Ward.)

(Whereupon Defendant's Exhibit AF for identification only was received in evidence.)

Mr. Rank: Now if the Court please, the next exhibit that we will offer is Defendant's U for identification, and that is a photostatic copy of the order in the United States District Court, Southern District of California, in the matter of Coast Redwood Corporation, a Chapter XI proceeding, and attached to it is a copy of the contract entered into between Union Bond & Trust and Coast Redwood, which have been approved by the Court and contain the provisions for the logging and the payment of the \$5 stumpage on logs removed by Coast Redwood, whether on Ward lands or Sage lands.

Mr. Phelps: And again, as to materiality——

The Court: That is Defendant's Exhibit U on pre-trial? [919]

Mr. Rank: Yes, it is.

Mr. Phelps: Yes, it is, your Honor, and again as to materiality, object to it on the ground that it is incompetent, irrelevant and immaterial and not bearing on any of the issues of this case. It injects something else in the case, it seems to me, that has no bearing on the case.

The Court: Let me see it.

Mr. Phelps: I don't want to consent that it may go into evidence and have it clutter up the record when I think it is not proper.

The Clerk: This was not in pre-trial, your Honor.

(Testimony of Harold L. Ward.)

The Court: This was in this trial?

Mr. Rank: Yes, it was in this trial.

The Clerk: That was filed on——

The Court: Let's see. I haven't got the date.

The Clerk: That was November 24th, your Honor.

The Court: I have it.

The Clerk: Is that admitted, sir?

The Court: Well, I will admit it for what it's worth.

The Clerk: Defendant's Exhibit U admitted into evidence.

(Whereupon Defendant's Exhibit U for identification only was received in evidence.)

Mr. Rank: Next is Defendant's AA for identification, and these are the series of letters that Mr. Wilson sent to Mr. Ward, the Ward Redwood Company, pertaining to the prior [920] contract, which we used in cross-examination of Mr. Wilson when he testified that he didn't have any attorney on May 1st, '46, and that I represented him, and so forth, and we ask that that go——

The Court: You can have that marked for identification. I don't see the materiality of this 1945 matter.

Mr. Rank: Well, here's where——

The Court: These were letters that passed in 1945, according to him.

Mr. Phelps: Yes, and that had to do with income tax matters.

(Testimony of Harold L. Ward.)

Mr. Rank: May I point out where it may be material? Counsel has a claim in the complaint that this May 1st agreement is not in fact an agreement of sale, but is a mortgage and was intended to be a mortgage between the parties, and there are some cases that hold under certain circumstances where one of the parties acts without legal advice and is an ignorant person and so forth, that all those things are taken into consideration, may be considered only as a matter of security on a sale, or a deed; and so, establishing the fact that the array of legal counsel that Mr. Wilson had, together with his testimony that at least two of the three people mentioned are still his counsel, may have some bearing on that matter, where, if the record were completely destroyed of anything of that nature, it might be somewhat a basis for argument. [921] I mean, that is one point where it may be material. I am not going to argue it, though.

The Court: Is it your contention this is a mortgage?

Mr. Rank: And so alleged in the pleadings.

Mr. Phelps: The cases indicate—but this has nothing to do, as I understand the case, with what counsel said. I mean, the fact that a person has an attorney or is ignorant, it isn't that at all. It is just the question of what the law conceives a contract of sale of this nature to be, whether it is—

The Court: Well, you mean by that that that becomes a question of law based upon the interpretation of the document?

(Testimony of Harold L. Ward.)

Mr. Phelps: Yes, that's my understanding of it.

The Court: And that's the basis that you are going to urge that point, you are not going to urge the question that it's a mortgage because of whether he was represented by attorneys or not?

Mr. Phelps: Well, I hadn't even thought of that point, if your Honor please, as one of the considerations.

The Court: Well, if that is the point, I will hold that this AA is immaterial. I don't see the point to it.

Mr. Rank: Well, I understand, Mr. Phelps, that you urged that point in one of the pieces of litigation with Sage on the hundred thousand dollar payment.

Mr. Phelps: No. [922]

Mr. Rank: And some of the cases that you cited went along. Now that is just my understanding of that.

Mr. Phelps: What you are talking about there was a deed absolute on its face.

Mr. Rank: I am not comparing that, I mean, the authorities on the argument that you used, because the authorities——

Mr. Phelps: That involved the old historic device of a deed absolute on its face, which was intended as a mortgage.

The Court: Well, all I am trying to find out is, whatever point you make in that regard, will be a point of law, will not depend upon any circum-

(Testimony of Harold L. Ward.)

stance as to representation by counsel at the time of the making of the contract.

Mr. Rank: We will withdraw it, if that is the case.

Mr. Phelps: That is true, your Honor, so far as that point is concerned.

The Court: Then I will hold that AA is inadmissible as being immaterial.

Mr. Cook: And is withdrawn.

Mr. Rank: Yes, is withdrawn from the general record.

(Whereupon Defendant's Exhibit AA for identification only was withdrawn.)

Q. (By Mr. Rank): Mr. Ward, let's just go briefly through the matter of the discovery of the shortages and what was done. It has been covered fairly well.

As I recall, in your direct testimony, the first possible [923] indication that you may have had of the fact that there might be a shortage was about the 29th or 30th of January, is that correct?

A. That's right.

Mr. Phelps: Object to that as leading and suggestive and quite argumentative.

Mr. Rank: Well——

(Conversation between counsel out of hearing of the Reporter.)

Q. (By Mr. Rank): And that was contained, or was that contained in a letter from Mr. Fletcher to you? A. Yes, that's right.

(Testimony of Harold L. Ward.)

Q. The date of the letter is January 29th?

A. January 29th, 1954.

Mr. Rank: I would like to offer that, to be marked in evidence, if the Court please.

The Court: Is that the same letter you referred to?

Mr. Phelps: Yes, that is my——

Mr. Rank: That is the letter he asked for.

The Clerk: That's Defendant's Exhibit AN introduced and filed into evidence.

(Whereupon letter referred to and identified above was received in evidence and marked Defendant's Exhibit AN.)

The Court: Would you tell me what the substance of that is? [924]

Mr. Rank: I can read just one paragraph. The first page of the letter discusses other matters pertaining to the logging and so forth, and the second page has the following:

"When the recent payment for \$6,509.29 arrived on January 25th in payment of the October stumpage, it seemed to me the amount was rather small for the stumpage reports which Mr. Harvey presented for the month of October. According to those records, from the Ward land we should have received in excess of \$15,000. I have written Mr. French calling this matter to his attention and enclose a copy of my letter which is self-explanatory. Certainly we are entitled to some explanation either

(Testimony of Harold L. Ward.)

from Wilson or Mr. Harvey concerning the accuracy of his figures.”

And the letter that was forwarded to Mr. French is in evidence.

Q. (By Mr. Rank): Now after that, Mr. Ward, when was the next time that you heard anything concerning a possible shortage from anybody?

A. Well, I was away from home in Boston from February 10th to the 23rd and when I got back, I found Mr. Wilson's, or rather Mr. Owens' letter of February 16th and——

Q. Well, Mr. Ward——

A. ——in which——

Q. Well, go ahead, finish your answer. [925]

A. ——in which he spoke about that they had owed us a very considerable amount for November, around \$10,000, and around \$15,000 for December. We had received no report on it as yet, and I felt, well, that's the explanation of this here—they have got some slips over into November instead of October; and then I was away again from home, I left on March 2nd and my secretary had been away on her vacation since the end of January, and then went down to Florida with her sister and brother-in-law, who was a Baptist minister, he was rather well along in years, he had a heart attack and they didn't know when she would be able to come home.

So then about the 8th of March I telephoned Lawrence Fletcher to see how things were getting along out here and that's the next I heard of it, in Boston.

(Testimony of Harold L. Ward.)

Q. Where were you at the time you made that phone call? A. I was in Boston.

Q. Telephoned Mr. Lawrence; where was he?

A. He was out here in Oakland.

Q. And then after the telephone call of Mr. Fletcher, March 8th, did you have notice—what was the next step, what was the next thing you heard about this matter and when?

A. After March 8th, the next thing I heard about it was when I met Mr. Fletcher in Washington on March 19th.

Q. And you received a further report from him at that time? A. Yes. [926]

Q. Mr. Ward, I call your attention to a question——

Mr. Phelps: Show me what you——

Mr. Rank: Oh, yes, page 82, lines 18 to 23.

Mr. Phelps: Just a moment, then, please.

Mr. Rank: Yes.

Q. Mr. Ward, I call your attention to the following question——

Mr. Phelps: Would you wait until I get a chance to read it, please?

Mr. Rank: Yes.

Mr. Phelps: All right, if you want to ask him, if you want to put a question now?

Mr. Rank: Yes.

Q. (By Mr. Rank): Mr. Ward, Mr. Phelps asked you the following question:

“Then when did you first receive a report, just the time, now, please, when did you first receive a re-

(Testimony of Harold L. Ward.)

port confirming that there was this discrepancy?"

Now what did you understand by that question?

Mr. Phelps: Now just a moment. I submit, if your Honor please, that the question and answers speak for themselves and this is an attempt to cross-examine his own witness.

The Court: What was the answer he gave?

Mr. Rank: The answer was, "Early in March in a telephone conversation that I had with Mr. Fletcher from Boston." That March 8th telephone. And the question is, "When did you [927] first receive a report confirming that there was this discrepancy?"

Mr. Phelps: You didn't read the rest of the answer. "He convinced me that after all there might really be something in it." And then the——

The Court: Well, what's wrong with that?

Mr. Rank: Well——

Mr. Phelps: Yes.

Mr. Rank: Seemed to be an inference, if the Court please, that early in March he received a report confirming the fact of this discrepancy, when that was not the case.

The Court: Well, the answer explains it, doesn't it? According to the answer that was just read, he said that in this telephone conversation, Mr. Fletcher convinced him that there was something wrong about this matter. I don't know what you are quarreling about.

Mr. Rank: All right.

(Testimony of Harold L. Ward.)

Q. After March 18th, Mr. Ward, some time thereafter, you came to the west coast, did you?

A. Yes.

Q. And what was the date of your arrival on the west coast? A. April 27th.

Q. 1954? A. 1954.

Mr. Rank: I am going to ask a leading question. If you [928] won't object, it will save a half-hour.

Q. (By Mr. Rank): Mr. Ward, is it or is it not true that between March 18th and the time of your arrival on the Coast, you discussed this general matter with the various other members of your family? A. Yes.

Q. And with General Strong? A. Yes.

Q. Now when you arrived on the Coast, had you reached a decision as to whether or not you would terminate the contract or give a notice of termination? A. No.

Q. After you arrived on the Coast, did you have a meeting or a conference with any of the people out here that had been working for you?

A. Yes.

Mr. Phelps: Well, that's immaterial, isn't it if your Honor please? I don't see any—whether or not he had a meeting.

Mr. Rank: It is a preliminary matter, your Honor.

Mr. Phelps: Isn't it a question of what he ultimately did? Isn't that—his language—

Mr. Rank: Well, I think there's more to it than

(Testimony of Harold L. Ward.)

this. I am not going into the details of the conference or the reports.

Mr. Phelps: All right, all right. [929]

The Court: Well, let him answer that he had a meeting. You did have a meeting?

The Witness: Yes, yes, I did.

The Court: All right.

Q. (By Mr. Rank): What was the date of that conference and with whom was it?

A. May 6th, and it was W. W. French and Stanley Fleckner and Mr. Rank.

Q. And where was it held?

A. In Oakland.

The Court: And when was the notice of cancellation given?

Mr. Rank: May 12th.

The Court: May 12th.

Q. (By Mr. Rank): Now thereafter, when did you make up your mind, as far as you were concerned, that you wanted and were going to terminate the contract, give notice of termination?

Mr. Phelps: I object to that, if your Honor please, as incompetent, irrelevant and immaterial, doesn't make any difference when he made up his mind so far as he himself is concerned.

The Court: Well, of course you made some point about that.

Mr. Phelps: Yes, but——

The Court: I don't think it is material, I don't think either what you have urged in connection with that or what [930] counsel is now attempting

(Testimony of Harold L. Ward.)

to urge in connection with it is material legally to the matter.

Mr. Phelps: Well, perhaps I didn't express myself the way I intended.

Mr. Rank: I am very definitely trying to meet that very thing.

Mr. Phelps: Perhaps I hadn't expressed myself the way I intended, then. I meant it wouldn't be material wherein this particular individual made up his mind for his own behalf; there were also others involved—eleven others, or whatever it is.

The Court: Well, I read the deposition of Mr. Strong, which you offered, and in which the facts with respect to that meeting were gone into.

Mr. Phelps: Well, let's go, let's let him answer.

The Court: I don't consider that that is material, nor do I consider that whether there was a meeting, how much they discussed it—

Mr. Phelps: I will withdraw the objection.

The Court: Or, the only thing that counts, is whether or not the notice of cancellation was warranted. That's all.

Mr. Phelps: I will withdraw the objection.

The Court: All right. I don't think this means anything one way or another, but counsel has withdrawn the objection.

Mr. Rank: I have forgotten the question [931] now.

Mr. Phelps: When did he make up his mind.

(Testimony of Harold L. Ward.)

The Court: You asked him, I think, when he made up his mind.

Q. (By Mr. Rank): Yes.

A. The following day, on May 7th.

Q. On May 7th. Did you communicate that fact to the people whom you were speaking for, that is, the other defendants and cross-defendants?

A. I did, yes.

Q. By letter?

A. Yes. I should qualify that; to everyone except General Strong, who was on his way out here then.

Mr. Rank: Yes.

Mr. Phelps: To save you time, with respect to that letter, it's addressed to "Dear Nephews, Nieces and Daughter," and certainly is a self-serving document. I will object to it on that ground.

The Court: Well, of course you have offered in evidence this deposition of Strong.

Mr. Phelps: I appreciate that, your Honor.

The Court: And in that you are endeavoring, I take it, to show that what the family were considering was whether they should or should not take advantage of this default, and——

Mr. Phelps: This letter doesn't meet that, Your Honor.

The Court: And I suppose this is some letter advising the family? [932]

Mr. Rank: That he made up his mind.

The Court: What he was going to do.

Mr. Rank: That's all there is to it.

Mr. Phelps: I will stipulate that by letter of

(Testimony of Harold L. Ward.)

such and such a date, he advised—this letter was sent to nephews, nieces and daughter advising that he had made up his mind. Is that all right?

Mr. Rank: Well, I mean, I want to put the letter in.

Mr. Phelps: Stipulate—I won't stipulate the letter may go in. Otherwise there is other self-serving statements in there.

Mr. Rank: I don't think there are any other self-serving statements in it.

The Court: Let's see the letter.

Mr. Rank: I don't like to take so much time on this, but I think it is something you should read.

The Court: Well, in view of counsel's offer of stipulation, I see no reason why the letter can't be marked. I don't see anything in it beyond that.

Mr. Rank: All right.

The Witness: Could I explain one——

Mr. Rank: No, no, that's all right, Mr. Ward.

The Clerk: Defendant's Exhibit AO filed into evidence.

(Whereupon letter referred to above was received in evidence and marked Defendant's Exhibit AO.) [933]

Q. (By Mr. Rank): Did Mr. Strong advise you or report to you or tell you at any time that he likewise had made up his mind to terminate the contract?

Mr. Phelps: Objected to as hearsay.

A. He hadn't, no.

(Testimony of Harold L. Ward.)

Q. (By Mr. Rank): I say, did he tell you at some time that he had made up his mind, report to you——

A. Yes.

Q. ——as his other attorney in fact?

A. Yes.

Q. And on what date was that?

A. On May 11th.

Q. May 11th, thank you. Now to another subject, Mr. Ward.

On May 1st, 1946, what company or companies owned the property over on Blue Creek, and to which was referred in the letter marked Plaintiff's Exhibit 5, which is the letter of May 1st, 1946, from you to Mr. Wilson?

A. I recognize that. The Ward Redwood Company and the National Bank of Bay City, Michigan.

Q. Owned that property at that time?

A. Owned that property at that time.

Q. Now did you have further conference with Mr. Wilson or any of his companies concerning the matter covered in that letter?

A. I think there was some correspondence at a later time. [934] That is along about 1949.

Mr. Rank: I will skip that for a moment, if the Court pleases. I will come back to it if I can find the document at recess.

May I have that letter of February 16th? It's Plaintiff's——

(Conversation among Court, counsel and Clerk regarding whereabouts of letter.)

(Testimony of Harold L. Ward.)

Q. (By Mr. Rank): Mr. Ward, I show you Defendant's Exhibit S and will you explain the matter of the charges for the December logs, that is, the request by you for a further payment on December logs and explain how you arrive at that?

A. Well, let me see, now. I got home from Boston on March 24th and Mr. Wilson had sent a payment on March 21st. My secretary was still not home. Some logging slips had come in packages, they were just piled up in the office there. I didn't attempt to do anything with them until she got home. And then she checked them over and——

Q. Show you also your letter of April 15th, Plaintiff's Exhibit 6. A. Yes.

Q. Which is your reply to that.

A. And I found this about them, that in the first instance Mr. Wilson had sent us a report back in January for December logs, showing a total amount payable of around \$1,200, and then the next thing that came along was this letter of February [935] 16th, which showed that almost three million feet of logs for December, or very nearly \$15,000, but there was no report or logging slips, and then a day or so later came logging slips a great bundle of them, for the month of November and also the month of December. They came together. And then in March, March 21st, came this check.

Well, everything was for a different amount. The logging slips added up to one amount and the check was for another amount, and the amount mentioned in this letter of February 16th, of timber,

(Testimony of Harold L. Ward.)

was for a different amount of timber from what the check was for in the letter of transmittal that we got to the check.

Q. So may I ask you this, Mr. Ward? Your letter of April 15th, is this not correct, that your letter of April 15th advising Union Bond & Trust that they were some \$2,300 short, was based upon a computation of the quantity set forth in the letter of February 16th, times \$5? A. That's right.

Q. That's correct. And then subsequently, after examining and analyzing all of the slips and pink slips that had been sent, you found that the actual amount that should have been billed for December was less? A. Yes.

Q. And then——

Mr. Phelps: When was that, let's—— [936]

Mr. Rank: Well, that is May 13th.

Mr. Phelps: Well, when did he find out?

Mr. Rank: Oh.

Q. Well, when did you discover that?

A. Well, my secretary finally got back on the 10th or 12th of April. Then she began to work at these things and in going through the slips that Mr. Wilson had sent for December, she found that there were some January slips mixed in with them, and when those January slips were sorted out, why, it made a difference.

Q. And when would you say that you finally made the final computation that was included in the billing contained in the letter of May 13, 1954, to Mr. Wilson or to the Union Bond & Trust?

(Testimony of Harold L. Ward.)

A. Oh, well, that was after I got out here.

Q. Sometime between April 28th and May 13th, is that correct? A. Yes, yes.

Q. Now there has been some testimony, Mr. Ward—and calling Union Bond & Trust's attention to shortages at various times. I show you a letter of July 17th, 1953, and ask if you sent that letter to Union Bond & Trust, or your secretary did, at your direction? A. Yes, that's so.

Q. Actually you were in Europe at that time, were you not, Mr. Ward? [937]

A. That's right.

Q. But I am using that as an example of how the shortages were computed.

A. Yes, they were computed from Mr. Wilson's own statements.

Q. Yes.

Mr. Rank: I will ask this be marked in evidence and——

Q. (By Mr. Rank): Now what do you mean——

The Court: Wait just a moment, now.

Mr. Rank: Oh, sorry.

The Clerk: Defendant's Exhibit AP introduced and filed into evidence.

The Court: AP?

The Clerk: Yes.

The Court: That is a letter of what date?

The Clerk: July 17th, 1953, to A. K. Wilson by Gladys F. Browndige, Secretary to Mr. Ward.

(Testimony of Harold L. Ward.)

(Whereupon letter referred to and identified above was received in evidence and marked Defendant's Exhibit AP.)

The Court: Now what does that letter say? I can't follow the testimony unless you tell me what it is.

Mr. Rank: Yes, it is really self-explanatory.

"This will acknowledge receipt of letter dated June 25, 1953, from Coast Redwood Company by Paul C. Owens with reports of logs removed during the months [938] of March and April of 1953. We have also received the log tickets for the above amounts. Your report for the month of March shows a total of 1,170,577 feet, for which the payment should be \$5,852.78. However, your check of June 24 for the month of March was for \$5,782.11. This would leave \$70.67 as still owing on this account. Would you therefore kindly send us a check for \$70.67 in settlement of this difference?"

I think it is self-explanatory.

Q. (By Mr. Rank): Call your attention now, Mr. Ward, to the reports—that is, the monthly reports. When, if at all, did you receive the report for Union Bond and Trust logs for the months of November and December?

A. We have never had any report for the Union Bond & Trust logs for the month of November and December.

Q. Have you ever at any time had any reports at all for the Union Bond & Trust logs?

(Testimony of Harold L. Ward.)

A. No, we haven't.

Q. When did you receive the Union Bond & Trust scale slips for the months of November and December, 1953?

A. They came about, well, they were sent on February 16th. I suppose they were received about February 20th.

Q. About February 20th?

A. Yes, they were postmarked, I think, February 17th. [939]

Q. February 17th, postmarked where?

A. From Arcata.

Q. Arcata. Now had you at any time received prior to that time any pink slips from Union Bond & Trust, that is, for Union Bond logs?

A. No.

Q. When did you receive the pink slips from Union Bond & Trust covering their logging for the June to October, 1953, period?

Q. In August of 1954.

Q. Did you receive any report, monthly report from Union Bond & Trust for logs removed by it during the month of January, 1954? A. No.

Q. Have you received any monthly reports at all since that time for logs removed by Union Bond & Trust? A. No.

The Court: For the year '54?

Mr. Rank: The year '54, yes. If the Court please, to just shorten this particular matter, on the matter

(Testimony of Harold L. Ward.)

of the application or the claim of offset on the minimum payment allegation in the complaint, I suggest that I simply offer some correspondence and one question and let it go at that.

Mr. Phelps: Yes, good idea.

(Conversation between counsel out of hearing of the Reporter.) [940]

The Court: Well, while you are looking at that, we will take a brief recess.

(Short recess.) [940-A]

Mr. Rank: May I offer, if the Court please, a group of correspondence mainly consisting of wires which have to do with the matter of the minimum payment.

Mr. Phelps: There is no objection.

The Court: All right.

The Clerk: That will be Defendant's Exhibit AS introduced and filed into evidence.

(Whereupon, documents referred to above were received in evidence and marked Defendant's Exhibit AS.)

Mr. Rank: I also offer a letter as the next——

The Court: What is the substance of this correspondence regarding the minimum payment?

Mr. Rank: May I ask one question of the witness?

The Court: All right.

Q. (By Mr. Rank): Mr. Ward, in determining the amount due Blue Creek on the minimum pay-

(Testimony of Harold L. Ward.)

ment for 1949, what payments made prior thereto by Union Bond and Trust did you credit to the minimum?

A. All payments made from May 16th, 1948, and prior to May 15th, '49—from May 16th to May 15th, '49.

Mr. Rank: This group of correspondence pertains to that; in other words, whether that was a correct application, what it was, and so forth.

The Court: Do I have to read it? Is it of importance in [941] the matter?

Mr. Rank: I don't think so, but I think on the face of the contract that it is very important, and if it becomes necessary as part of their argument, as to whether or not they are entitled to this credit, then it may be necessary to read it. I think it is better just to put it in the record.

The Court: You mean bearing upon the amount due under the contract?

Mr. Rank: If you recall, the contract provides——

The Court: A \$40,000 minimum.

Mr. Rank: Mr. Ward in 1949 and 1950 billed Mr. Wilson for that \$40,000 less payments that had been made in the prior year. There was a dispute. Mr. Wilson claimed he was entitled to credits for logs that had been removed but not paid for, and for logs and timbers left in the woods for which stumpage might be paid. And that is the basis of their contention that they were entitled to a further credit.

(Testimony of Harold L. Ward.)

The Court: Well, as of an accounting on the date of cancellation?

Mr. Rank: That is their claim. May I ask Mr. Ward one more question?

Q. (By Mr. Rank): Mr. Ward, you are familiar, or are you familiar with the amount that Mr. Wilson claimed should have been credited to his account in further reduction of the 1949 minimum? And I am not asking you about the dollars and [942] cents amount, but are you familiar with that item?

A. Well, yes, I am familiar; I was asked for those credits, yes.

Q. Did you in considering the minimum payment due in 1950 credit that particular item to the minimum? A. Yes.

Mr. Rank: In other words, it was a question of whether or not payment for logs that had been removed prior to May 1st, that payment was made after May 15th, should not have been credited against the minimum payment of 1949, and I thought they had abandoned that.

The Court: From 1949 on, I understood you to say that every year under the contract all payments exceeded the minimum payment?

Mr. Rank: No, there was one more year, 1950. In 1950 there was still a balance on the minimum.

The Court: All right.

Mr. Rank: I would like to offer next a letter of July 20th, 1950, from A. K. Wilson and Union Bond

(Testimony of Harold L. Ward.)

and Trust to Blue Creek Redwood Company, which has to do with the 1950 minimum payment.

Mr. Phelps: No objection.

The Clerk: That is Defendant's Exhibit AR introduced and filed into evidence.

(Whereupon, letter referred to was received in evidence and marked Defendant's Exhibit AR.) [943]

Q. (By Mr. Rank): Mr. Ward, I show you a compilation and I will ask if that was prepared under your direction, showing the credits made and given to Union Bond and Trust Company against the minimum payments due in 1949 and 1950?

A. Yes.

Mr. Rank: This, if the Court please, is more a matter of assistance to the Court, because it sets out plainly all payments. We will ask that it be marked Defendant's Exhibit next in order.

The Court: Defendant's Exhibit AS introduced and filed into evidence.

(Whereupon, compilation sheet referred to above was received in evidence and marked Defendant's Exhibit AS.)

Q. (By Mr. Rank): Mr. Ward, I show you Defendant's Exhibit J, which consists of all the logging reports received from the Union Bond and Trust from January, 1953, on, including the last report sent, and just ask you this: Are these similar in form or alike in form to the reports received at

(Testimony of Harold L. Ward.)

all times during the prior years of the contract?

A. Yes.

The Court: Do I understand that that had to do with the monthly recapitulations from January, 1953, on?

Mr. Rank: Yes; when we refer to monthly reports, if the Court please, that is what we are referring to. [944]

The Court: All right.

Mr. Rank: I don't believe that this matter has come up here, but there was a claim made during the deposition that there was a possible contention on the part of Union Bond and Trust that Union Bond and Trust might be entitled to a deed to parcel one. You recall there are two parcels, the first one for \$600,000 and to Parcel 2, there was an option which was subsequently exercised. I just don't know quite what they were getting at, but in view of that I would like to offer a letter.

The Court: I thought the stipulation was that there was \$585,000 paid on this contract.

Mr. Rank: Yes, but I asked Mr. Wilson if he felt under the terms of the contract, if he so desired, he could pay an additional \$35,000 and get a deed to Parcel 1 of the contract; that is, that they were separate and distinct purchases and sales.

Mr. Phelps: I have no objection to that.

Mr. Rank: I just want to put this letter in. This letter, if the Court please, is a letter dated December 4, 1950, addressed to A. K. Wilson, president, Union Bond and Trust Company:

(Testimony of Harold L. Ward.)

“Pursuant to Paragraph 7 of the agreement dated May 1, 1946, between Blue Creek Redwood Company, Inc., and yourself, this will notify you that the [945] United States Government has not purchased the real property referred to in Paragraph 7 by the 1st day of December, 1950; and pursuant to said Section 7, said real property will, from and after the 1st day of December, 1950, be included in said Agreement of May 1, 1946; and become a part of “said lands,” and is subject to all of the terms and conditions of the said agreement.

“Blue Creek Redwood Company. (signed) Harold L. Ward, President.”

And Mr. Wilson did ultimately send his initial payment on that additional purchase, Mr. Ward?

A. Yes.

The Court: Defendant's Exhibit AT introduced and filed into evidence.

(Whereupon, letter from Ward to Wilson read above was received in evidence and marked Defendant's Exhibit AT.)

Mr. Phelps: That is the \$25,000?

Mr. Rank: Yes, that is the \$25,000.

Q. (By Mr. Rank): Mr. Ward, since May 1st, 1946, have you employed various persons to check operations in the woods, logging methods, and so forth?

A. Yes.

Q. And have you since that date employed counsel to aid in [946] the administration of the contract insofar as it pertains to performance by Union Bond and Trust?

A. Yes.

(Testimony of Harold L. Ward.)

Q. And have you made trips to the West Coast for the same purpose, namely, in the matter of the administration of the contract insofar as it appertained to the performance by Union Bond and Trust?

A. Yes.

Mr. Phelps: All right—Well, he has answered it.

Q. (By Mr. Rank): What expense, total expense, has blue Creek Redwood and the individuals who are now owners been put to since May 1st, 1946, in the matter of the administration of the contract insofar as it appertains to the performance by Union Bond and Trust Company of the terms and conditions of the contract?

Mr. Phelps: If the Court please, that is objected to as incompetent, irrelevant and immaterial, without foundation, not binding on the plaintiff Union Bond and Trust Company. They can expend a hundred thousand dollars or ten dollars; it is a matter for their judgment, not something that can be binding on us, and it certainly has no relevancy to any of the issues of the case.

The Court: I think there might be some possible relevancy as to expenditures made since——

Mr. Phelps: May 12th. [947]

The Court: Since—what was the date French was employed?

Mr. Phelps: Well, he was employed——

The Court: No, no, the time that he was employed——

Mr. Rank: January 29th?

The Court: 1953?

(Testimony of Harold L. Ward.)

Mr. Rank: No, 1954.

The Court: There might be some relevancy as to expenditures made since January of 1954.

Mr. Rank: That is correct. I don't think there is any question about that. However——

The Court: But up to that time I don't think there would be. I don't think the expenditures made in protecting the interests of the parties to the contract would be material. They, as counsel said, could have spent as much or as little as they wished in that regard.

Mr. Rank: May we put it this way, if the Court please: It has already been established by his testimony that it was necessary to employ counsel, and so forth, in the administration—that if in the form of the decree, the Court feels that that may be material that that will be one of the matters that will be before the Court in the actual and final framing of the decree?

The Court: You mean if the Court determines that the ascertainment of the amount of such expenses——

Mr. Rank: That is correct. [948]

The Court: ——would be necessary in framing the decree——

Mr. Rank: That is correct.

The Court: ——then the Court could always, of course, enter an interlocutory decree or leave the matter to a master or something of that kind, if that became necessary.

Mr. Rank: That is satisfactory. And I might say to the Court that of course we don't know all

(Testimony of Harold L. Ward.)

of the expenses that we will be put to in this particular matter, that is from January 29th on. That is a matter that may be determined later, if necessary.

Q. (By Mr. Rank): Mr. Ward, at the time of the execution of the May 1st, 1946, agreement, did you intend it to be a mortgage? A. No.

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial.

Mr. Rank: There is an allegation in the complaint that the parties, including Mr. Ward and Blue Creek, intended this to be a mortgage. I think this is a perfectly proper question to ask him, if he intended it to be a mortgage at that time in view of that allegation.

Mr. Phelps: The question is as a matter of law what the language means.

The Court: Well, I don't think it would make much difference what way he answered it. [949]

Mr. Rank: Well, when you make an allegation that the parties intended a certain thing, it would be a subject——

The Court: I wouldn't waste any time on that, Mr. Rank; I am not going to pay any attention to that.

Mr. Rank: All right, I have just one more matter.

Q. (By Mr. Rank): Mr. Ward, calling your attention to the conversation you had with Mr. Holter, in May, I believe, of 1945, concerning the continuance of the working out of a right-of-way agreement—do you recall that conversation?

(Testimony of Harold L. Ward.)

A. Yes.

Q. Will you relate to the best of your recollection where it was held and what was said at that time?

Mr. Phelps: Objected to as hearsay. Mr. Holter was here. If you wanted to establish anything as to Mr. Holter, he should have been asked about it.

Mr. Rank: Yes, certainly. He was here as a witness.

The Court: You questioned him concerning that.

Mr. Rank: As their witness.

Mr. Phelps: Yes, your Honor. If the intent is to now impeach Mr. Holter, then the only proper way is to put the impeaching question, did he say so and so, so that he is referred to a specific matter.

The Court: He may not be impeaching him.

Mr. Rank: I want to confirm it.

The Court: He may want to corroborate the testimony [950] that the witness gave.

Mr. Phelps: He may very well, but if he does, then it becomes hearsay, if your Honor please. He can't testify as to what Mr. Holter said.

Mr. Cook: He was a party to the conversation.

Mr. Phelps: Oh, no. Either he accepts what Mr. Holter said, or he is going to impeach him. If he is impeaching him, he has to ask him an impeaching question.

The Court: Is this testimony going to be confirmatory of what Mr. Holter said?

Mr. Rank: It will be to a great extent confirmatory. [951]

(Testimony of Harold L. Ward.)

The Court: Well, I think probably your——

Mr. Phelps: You are not challenging——

The Court: ——objection would be good that it is hearsay.

Mr. Phelps: Certainly. That is——

Mr. Rank: No, I will, I am not going to argue the technicalities of that, but when one side offers one side of the conversation, with the adverse party, that adverse party is entitled to testify as to that conversation. That is my understanding of the Rule of Evidence.

The Court: Oh, yes, if you offered it to contradict the testimony, of course.

Mr. Rank: Well, whether it's——

The Court: But if he is going to say that what Mr. Holter says was correct, then it becomes hearsay.

Mr. Rank: Well, I asked him to relate the conversation, and it is a matter of, really a matter of interpretation of the effect of the conversation, and as he testified, as whether it is completely confirmatory or not. Now just as a matter of pure, basic principle of evidence, if one side through a witness gives a conversation with the party on the other side, that party is entitled to give that conversation also.

I mean, it seem to me that's basic. I think that the hearsay rule doesn't apply to that, at least it has never been my understanding of it.

Mr. Phelps: Well, that is one thing we can be sure of. [952]

(Testimony of Harold L. Ward.)

The Court: Well, the testimony of the witness Holter was only admissible on the ground that it constituted some admission or statement of fact of Mr. Ward that was material to some issue in the case. Now upon that ground Holter could testify to what Ward said to him. Now if you want to dispute that, of course I think there's no objection, no valid legal obstacle in the way of Ward, the witness Ward contradicting it.

Mr. Phelps: Well, if your Honor please, the matter of conversation that you referred to came on cross-examination of Mr. Holter by Mr. Rank, and it's——

Mr. Rank: I have no recollection whether it did or not.

Mr. Phelps: That is my understanding, but whether it did or not, I don't want to proceed on that assumption unless we can agree on it, but that is my recollection.

The Court: Well, unless counsel will state that this is impeachment of that testimony, why, I would hold that the objection is good.

Mr. Phelps: The rule is that before——

The Court: Well, I have ruled now, counsel.

Q. (By Mr. Rank): Calling your attention to Plaintiff's Exhibit 3, Mr. Ward, which is the February 29, 1954, letter, was there ever any agreement of right-of-way or rights-of-way between Sage and any of the Ward Companies executed?

A. No. [953]

Mr. Phelps: That calls for his opinion and con-

(Testimony of Harold L. Ward.)

clusion and objected to as to the form of the question.

The Court: Was there any written document executed?

Q. (By Mr. Rank): Well, that's what I meant to inquire, Mr. Ward. Any written documents?

A. The answer is no.

Mr. Rank: The answer is no.

Q. Now, prior to the sale by the Ward interests to Union Bond & Trust and the Blue Creek interest to Union Bond & Trust, and prior to the date of the sales, insofar as you know them and have been brought out here to the Sage people, were there any roads over the Sage and Ward properties in the colored area (indicating chart)?

A. No.

Q. Had there ever been any use, to your knowledge by the Sage people of the Ward lands or the Ward people of the Sage lands for right-of-way purposes?

A. No.

Mr. Phelps: If you know.

The Court: He said, to his knowledge.

Mr. Rank: That's right.

The Witness: I said no. My answer is no.

Mr. Rank: That's all.

Mr. Phelps: First of all, Mr. Rank, I think there is a matter we can establish. I think it is in evidence, these stumpage—are these in evidence? [954]

Mr. Rank: Yes, that is in evidence.

Mr. Phelps: And can we have a stipulation you obtained these on March 25, 1954?

Mr. Rank: Yes, March 25th.

(Testimony of Harold L. Ward.)

Mr. Phelps: All right.

The Court: Yes, T was admitted.

Mr. Phelps: It was stipulated those were obtained on March 25, '54, your Honor, by Mr. Rank.

Cross-Examination

By Mr. Phelps:

Q. Mr. Ward, in going over the correspondence I note that, and I refer you to Plaintiff's Exhibit 27, —I note that this Exhibit 27 is an exhibit containing the letters forwarding the checks, and then the letters of acknowledgment of various checks for the month covered by these letters. All right. Now I notice that in each instance in this exhibit, your letter acknowledging receipt of the check is within a matter of two or three days after the date of the letter sending them on to you airmail special delivery, and I think one is as high as four days away.

Is that your recollection, that in the ordinary course you would acknowledge those within a matter of routinely, within a matter of two or three days after you received those checks?

A. Well, when I was home and my secretary was home, yes. Otherwise, why, we might let it go until we were both there. [955]

Q. And then I call your attention to your letter contained in Plaintiff's Exhibit 6, Mr. Rank, to your letter of April 15, 1954. That is a letter in which you acknowledge having received a check for \$12,401.86, received with a letter of March 25th for

(Testimony of Harold L. Ward.)

logs during December, and state that it is short by some \$2,364. You recall that letter?

A. I recall the letter. This wasn't an acknowledgment, like the others you speak of. This letter was written to call Mr. Wilson's attention to the discrepancies.

Q. Now was there any letter just simply acknowledging that check sent in routinely two or three days after it was received?

A. No, neither my secretary nor I were at home, and so that wasn't done.

Q. When would you say——

A. At least, I doubt if it was done.

Q. Now as a matter of fact, you delayed that because you considered and wondered whether or not you should accept that check, knowing of this possibility of this discrepancy, isn't that a fact, Mr. Ward?

A. You mean delay this acknowledgment?

Q. Yes. A. No.

Q. Did you during that——

A. This isn't an acknowledgment, this was to call his attention to this discrepancy. [956]

Q. On April 15, 1954, upon receiving that check for \$12,401.86 did you discuss with anyone, the attorneys or anyone else, as to whether or not you should accept that amount in view of the possibility of a discrepancy? A. In April?

Q. Yes.

A. This is the check, now, that came in in March.

Q. Came in shortly after March 25th?

(Testimony of Harold L. Ward.)

A. After March 25th. Well, my recollection is, I simply deposited the check.

Q. When did you deposit it?

A. Well, I think probably—you see, I got home from Boston on the 24th of March. I think the check would have arrived about the same time. Now ordinarily if that happened, my secretary is away, I deposit the checks and let the acknowledgments come on later.

Q. Now a moment ago you told us that the reason that you didn't make the routine acknowledgment was because you were away. Now you tell us that you were home by March 24th.

A. I was home by March 24th, yes.

Q. All right. Now the letter enclosing the check for \$12,401.86 was sent from Arcata, as you have testified this afternoon?

A. Yes.

Q. And postmarked March 25th?

Mr. Rank: I don't think he testified it was postmarked [957] at all.

Mr. Phelps: All right. The letter——

Q. Was it not March 25th that it was postmarked, sir?

Mr. Rank: May we suggest that the record is the best evidence of that? There is——

The Witness: Can I—I think I have a list of the checks in my pocket here. I can look at the dates.

Q. (By Mr. Phelps): All right.

A. Let's see. Well, the date of the check was

(Testimony of Harold L. Ward.)

March 27th. I think the date of the letter was March 25th, so I guess I am off when I say March 21st. I guess I was mistaken.

Mr. Phelps: All right.

Mr. Rank: What were the dates you just read?

The Witness: The date of the check was March 27th. That's according to the list my secretary compiled.

Mr. Rank: Yes, it is in evidence.

The Witness: But my recollection is, I think the letter was dated March 25th.

Q. (By Mr. Phelps): The 25th. And you were present at your office and home in Orchard Lake, Michigan, when you received that letter, weren't you?

A. Yes, I would have been there by that time.

Q. You would have been back there?

A. I would have been there by that time.

Q. So the reason for not sending the routine acknowledgment [958] then, was not because you were not there, as you just explained?

A. No, that isn't it, that wasn't my explanation.

Q. Well, I think——

Mr. Rank: Just let him finish his answer, Mr. Phelps.

A. (Continuing): Routine matters like that, I didn't try to take care of when my secretary was away. I would wait until she would come back and then she would write those things, and I waited until she came back, and as a matter of fact, until I wrote Mr. Wilson, pointing out this discrepancy here, I didn't——

(Testimony of Harold L. Ward.)

Q. All right. Now when did you actually deposit that check for \$12,000?

Mr. Rank: If you recall, Mr. Ward.

A. Well, if I recall—well, I don't recall. I have no recollection about it, but the chances are I deposited it three or four days after I got home, I imagine. [959]

Q. It would be before the end of March or the 1st day or two in April?

A. Oh, I would think so, yes.

Q. All right. Now before you deposited that check, do you remember having any discussion as to whether or not you should accept it in view of the possibility of this discrepancy? A. No, no.

Q. You didn't do that?

A. No, no discussion.

Q. Did you have any discussion before you sent the letter of April 15th, whether you should send that letter before you—before you sent that letter, did you have any discussion with your attorneys whether you should send it?

A. No, I didn't.

Q. Acted on your own? A. Yes.

Q. Now you have told us what your prior knowledge has been about this. Let me ask you this, sir. Under this contract, on April 2nd, 1954, you were still acting under this contract and insisting on performance under this contract, weren't you?

Mr. Rank: To which we will object as calling for the conclusion of the witness and incompetent, irrelevant and immaterial. [960]

(Testimony of Harold L. Ward.)

The Court: Sustained.

Mr. Phelps: I will get at the fact, then, if your Honor please.

Q. (By Mr. Phelps): On April 2nd, 1954, Mr. Ward, did you not send a letter to Mr. Wilson reading as follows:

“Dear Art——”

Mr. Rank: That is in evidence, is it not?

Mr. Phelps: It is, yes.

Mr. Rank: We will stipulate the letter was sent.

Mr. Phelps: Thank you, but the Court has not heard this, and just as you have read letters, I should like, if I may——

Mr. Rank: I thought you read it when you put it in.

Mr. Phelps: No, I had not.

Q. (By Mr. Phelps): On April 2nd, 1954, then, it is stipulated that you write this letter:

“We have not received the logging report nor the logging slips from you on or before February 20th, 1954, covering logs removed during the month of January, 1954, nor have we received the logging report from you on or before March 20, 1954, covering logs removed during the month of February, 1954, as required under Paragraph 11 of our timberland agreement with you dated May 1, 1946, nor have we received payment as required under Paragraph 2(d) of said agreement for the logs removed during said months of [961] January and February, which was due under said agreement at Orchard Lake on

(Testimony of Harold L. Ward.)

or before February 20th, 1954, and March 20th, 1954, respectively.

“Please consider this letter as a notice of default from us in the performance of said agreement, as to the above particulars for——”

and there follows the language identical as in the other default notices.

Now, so that on April 2nd, 1954, regardless of its legal effect, sir, you were making demand upon the Union Bond and Trust Company for performance as stated in this letter of April 2nd, 1954?

Mr. Rank: To which we will object upon the ground the letter speaks for itself.

The Court: Sustained.

Mr. Phelps: Well, on April 21st, and we can cover this quickly—on April 21st, 1954, you sent another letter of like substance, identical in form as the one I last read to you, did you not, sir, except that it was for—covered for logs removed during the month of March, 1954?

Mr. Rank: We will stipulate that the letter was sent.

Mr. Phelps.: All right.

Q. (By Mr. Phelps): And at that time when you sent that demand and notice, that was just before you came west?

A. Came west, that's right, yes. [962]

Q. You had already had, of course, these conferences with your family and General Strong at that time?

A. Yes, we had been having some conferences.

(Testimony of Harold L. Ward.)

Q. And had received reports from Mr. Rank, had you not? A. Yes.

Q. Had discussed the matter with him——

Mr. Rank: Just a moment. Please let him finish his answer.

Mr. Phelps: I was just asking the fact.

Q. (By Mr. Phelps): Had you received reports from Mr. Rank? A. Yes, that's right.

Q. And had had the discussions, just that you told us about just a few moments ago. Those that preceded, of course, April 21st?

Mr. Rank: I don't think he——

The Witness: Well, I don't know what you are talking about there.

Mr. Phelps: All right. Just one moment, your Honor. I think that's all. Thank you, Mr. Ward.

Mr. Rank: Is that all?

Mr. Phelps: Yes.

(Conversation between counsel out of hearing of the Reporter.)

Mr. Rank: That's all, Mr. Ward. Thank you.

(Witness excused.) [963]

Mr. Rank: Now if the Court please, there are two matters. One, the interrogatories. I don't know just what the procedure is in that, but I would like the interrogatories and the answers to become part of the evidence in this matter. Now can we furnish a set of the interrogatories and the answers and have them marked in evidence?

The Court: What interrogatories are you referring to?

Mr. Rank: The interrogatories from Mr. Wilson of Union Bond and Trust.

The Court: You mean you are talking about interrogatories you propounded to——

Mr. Rank: Oh, yes, yes.

The Court: And the answers?

Mr. Rank: Yes, and the answers.

The Court: They may be called to the attention to the Court: You don't have to——

Mr. Phelps: Yes, they are on file.

Mr. Rank: It may go a little further than that. Do you recall in the pretrial conference, we stipulated that as to certain amounts of logs, quantities of logs, particularly those delivered after January 1st, 1954, that they were as set forth in the interrogatories. That is one of the things I have in mind. Now——

The Court: Well, let the record show that the answers to the interrogatories are part of the evidence in this case [964] now.

Mr. Rank: Thank you. I think that will cover it.

Now the same thing is true with the record in the pretrial conference. I believe the Court made a suggestion that that could be made a part of the record in this matter, and there are stipulations and——

The Court: Well, all stipulations and——

Mr. Rank: All proceedings——

The Court: Also stipulations and documents ad-

mitted in evidence in the pretrial conference will be considered as a part of the trial record.

Mr. Phelps: And the stipulations entered into at the pretiral may be considered to be stipulations for the purpose of the trial?

The Court: I say, all stipulations and documents admitted in evidence at pretrial will be considered a part of the trial record.

Mr. Phelps: Yes, your Honor.

The Court: That is what you want, isn't it, both sides?

Mr. Phelps: Right.

Mr. Rank: Yes, that is satisfactory.

Now Mr. Phelps, what shall we do with these books? We have a stipulation as to Q, P and R, I believe. Is that covered by the stipulation, P, Q and R?

Mr. Phelps: Yes. [965]

Mr. Rank: Those include——

Mr. Phelps: And the same stipulation can cover Exhibit X.

Mr. Rank: Yes, that's—let's do that with Exhibit X, too.

Mr. Phelps: All right.

Mr. Rank: Defendant rests—Oh, just a moment, if the Court please.

Mr. Cook has just called my attention—Mr. Cook, would you step up?

(Conversation among counsel out of the hearing of the Reporter.)

Mr. Rank: If the Court will just bear with me

for one moment. When you are trying to clean up the tail ends of the case and most of it has been put in by the other side, it's a little difficult at times.

If the Court please, we would like to introduce the following from the deposition of Mr. A. K. Wilson. I understand the deposition, the original has not been filed, has it, Mr. Phelps?

Mr. Phelps: It hasn't, but that won't make any difference, because I have it right here and it can be filed. We waived signature.

Mr. Rank: Yes.

Mr. Phelps: But I don't understand that that's the proper [966] way to introduce a portion of the deposition. What is it you want? Just show me quickly.

Mr. Rank: No—pertaining to construction, all—a little over a half a page (indicating).

Mr. Phelps: I don't think this is a proper way, but if you want to stipulate to that portion of it, I will stipulate as long as you just fix the time that you are referring to.

Mr. Rank: Yes, yes. I think it is, but we have the right to offer it. The time referred to in the following questions and answers is prior to January 30, 1953. It pertains to road construction and so on. And the question—or will you stipulate there was the question——

Mr. Phelps: I will stipulate these questions were asked and these answers were given on the taking of the deposition.

Mr. Rank: (Reading).

"Coast Redwood Company owns its own equipment, did it?

"Answer: Yes.

"And performed the logging itself?

"Answer: Yes.

"Maintained the shop?

"Answer: Yes.

"Trucks and maintains the road?

"Yes.

"Union Bond and Trust had nothing to do with the [967] construction of the roads at that time?

"(Witness shakes head in negative manner.)

"Mr. Rank: I don't know whether you heard the answer.

"Answer: No, excuse me."

That's all.

Mr. Phelps: This is prior to January——

Mr. Rank: January 30, 1953. That is prior to the debtor proceedings of Coast Redwood.

The Court: Now does that——

Mr. Rank: We rest:

(Defendant Rests.)

The Court: Except for such matters as you might wish to correct, does that conclude the testimony on both sides?

Mr. Phelps: Yes, your Honor.

Mr. Rank: Yes, your Honor.

Mr. Phelps: The Clerk has just handed me three documents. I was just checking, they are only in for identification and I think as to each, they won't

serve any purpose by being added to the record, so —they are the checks, those checks which——

Mr. Rank: Well, they are yours, aren't they?

Mr. Phelps: Yes, they are all mine. I just wanted to [968] show them to you.

Mr. Rank: Yes, they are withdrawn, are they?

Mr. Phelps: They can be withdrawn, yes, and the record will show the numbers as I read them off to your Honor.

The Clerk: Better leave them in.

Mr. Phelps: The Clerk says leave them in, and he knows how he wants to run his desk.

The Court: All right.

Mr. Rank: For the record, may we just renew all our motions that we made at the close of the Plaintiff's case?

The Court: All right, the record will so show.

(Whereupon, both sides having rested, a discussion was had among Court and counsel regarding the further progress of the matter, which was reported but not here transcribed.)

(Whereupon, an adjournment was taken in the instant cause until 2:00 o'clock p.m., Thursday, December 2, 1954.) [969]

ORAL ARGUMENT

December 3, 1954, 10:00 A.M.

* * *

Mr. Rank: All right, my idea of the decree is this, that we have to be given the land. They have paid us \$586,000. That we should be ordered to pay them a figure starting with the \$586,000. We are entitled to certain credits under that, certain benefits that they have received, the minimum of which [18*] would be the contract price for the quantity of timber removed.

The Court: The contract price——

Mr. Rank: The minimum.

The Court: \$5?

Mr. Rank: Yes, yes, the minimum that we should be entitled to would be the contract price for the timber removed. There has been approximately, I think, 93 million—I mean, that is a matter of——

The Court: You are talking about the total amount?

Mr. Rank: Yes.

The Court: From the beginning of the contract?

Mr. Rank: Oh, yes.

The Court: And how much does that amount to, approximately?

Mr. Rank: Well, around \$500,000, I believe, worth of timber. There has been a little less than a hundred, there has been 93 million feet of timber removed.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Yes?

Mr. Rank: 93 million feet of timber removed at \$5.

The Court: And you have been paid \$586,000?

Mr. Rank: We have received \$586,000.

The Court: All right.

Mr. Rank: And we should be entitled at least to the credit of the contract price on the timber.

The Court: Well, what is that? That's about \$465,000?

Mr. Rank: Yes, yes. [19]

The Court: All right.

Mr. Rank: Now there is the basis of framing the decree.

The Court: I still don't get the effect of that. What do you mean by that?

Mr. Rank: My last statement?

The Court: Yes. You should at least be—oh, I see.

Mr. Rank: Oh, well, they have taken the timber.

The Court: That is the minimum amount you are entitled to under the contract, yes.

Mr. Rank: Yes, oh, yes. Yes. In other words, following the principle of these cases, they have made a part——

The Court: If you want to take back the land, then you should get back the land as is?

Mr. Rank: That's right.

The Court: And be entitled to keep the purchase price of the timber removed?

Mr. Rank: Yes.

The Court: The agreed price of the timber removed.

Mr. Rank: Yes, yes. I kind of—I want to be sure I follow you on that.

The Court: That would mean a difference of about \$121,000.

Mr. Rank: Yes. Actually it comes down to this. They have paid us \$180,000 more than the——

The Court: Oh, yes, because there has been——

Mr. Rank: Advance payments. [20]

The Court: That difference in fact is \$186,000?

Mr. Rank: Yes, yes, to which we would be entitled. Of course, then they owe us money for timber which they removed, but there's about \$185,000 difference, and I think——

The Court: Then you would have to deduct from that, according to your theory——

Mr. Rank: The money they——

The Court: ——the amounts they owe, which is about——

Mr. Rank: \$75,000 or \$80,000.

The Court: So that would leave about \$105,000 or \$110,000.

Mr. Rank: Whatever they might, whatever they may pay.

The Court: That you would have to pay them to keep the land.

Mr. Rank: Whatever it might be, that's correct.

The Court: Now I understand. That is the first time that has been stated.

Mr. Rank: That has been my theory, I mean, that has been my thinking in this right from the very outset. Of course it is the first time we have had an opportunity to discuss it. Now may I just

give one more example—maybe not—but may I just take five minutes——

The Court: I just want to crystallize that so I can get it clearly, now. Your point, then, is that under the California law, since this, in your opinion, on the evidence was a wilful and grossly negligent breach of the contract, that [21] under the more recent California decisions the only relief that the defendant can have by virtue of these reciprocal demands between the parties here is that he may get the difference between what the defendant has already received under the contract and what he would be entitled to receive?

Mr. Rank: That's right. In other words, he is entitled to his——

The Court: That's not relief which the section grants him, but it's relief which the decision, on the principles that have been extended by the California decisions, he would be entitled to?

Mr. Rank: That's right. In other words, to prevent a punitive damage.

The Court: And that the purpose of that is to prevent——

Mr. Rank: Punishment.

The Court: ——punishment of the defendant?

Mr. Rank: That's right.

The Court: That's your position?

Mr. Rank: That's my position.

The Court: All right. [22]

[Endorsed]: No. 14996. United States Court of Appeals for the Ninth Circuit. Harold L. Ward, et al., Appellants, vs. Union Bond & Trust Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 11, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14996

HAROLD L. WARD, et al.,

Appellants.

vs.

UNION BOND & TRUST COMPANY, a Corpora-
tion,

Appellee.

STATEMENT OF THE POINTS TO BE
RELIED UPON BY APPELLANTS

The following points will be relied upon by appellants:

(1) The District Court erred in allowing appellee (a wilfully defaulting vendee) to complete the contract (by paying the balance of the purchase price plus attorneys' fees, interest and certain of appellants' costs and expenses) and obtain title to the land since, under the applicable California law, a wilfully defaulting vendee is not entitled to reinstatement of a contract terminated by the vendor because of the wilful defaults of the vendee.

(2) The District Court erred in concluding that justice and equity required that appellee be allowed to complete the contract since, under the applicable California law, (a) restitution of the amounts paid by him in excess of the damages sustained by the

vendor is the only equitable relief from a forfeiture and penalty (assuming, but not conceding, that there was a forfeiture and penalty in this case) to which a wilfully defaulting vendee may be entitled and (b) appellee's defaults and conduct under the contract were such as to require in any event that it be denied all equitable relief.

(3) (a) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract.

(b) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract in the absence of (1) a finding as to whether the amounts paid by appellee exceeded the damages sustained by appellants and (2) a finding as to the reasonable value of the use of the property during the eight years during which appellee was in possession of the property.

(c) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract since (1) there is no evidence in the record as to whether the amounts paid by appellee exceeded the damages sustained by appellants and (2) there is no evidence in the record as to the reasonable value of the use of the property during the eight years during which appellee was in possession of the property.

/s/ CARLETON L. RANK,

/s/ HERMAN COOK,

HARDIN, FLETCHER, COOK
& HAYES,

By /s/ CYRIL VIADRO,
Attorneys for Appellants.

Service of copy admitted.

[Endorsed]: Filed January 23, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO PRINTING
OF RECORD AND RELATED MATTERS

It Is Hereby Stipulated as Follows:

I.

On the terms and conditions hereinafter stated in paragraphs II to V, both inclusive, no parts of the record except those specified in this paragraph I need be printed. The following parts of the record shall be printed (including, unless otherwise indicated, all documents attached thereto):

- (1) Complaint
- (2) Answer and Cross-Complaint
- (3) Affidavits of S. L. Fleckner and Ernest Harvey attached to Notice of Motion for Injunction Pendente Lite
- (4) Interrogatory numbers 1 through 66 of Defendants and Cross-Complainants Addressed to Plaintiff and Cross-Defendants
- (5) Answers to Interrogatories
- (6) Answer to Cross-Complaint
- (7) First Amended Complaint

- (8) Answer to First Amended Complaint
- (9) Amendment to Cross-Complaint on its Face
- (10) Opinion
- (11) Engrossed Findings of Fact and Conclusions of Law and Interlocutory Decree (filed March 8, 1955)
- (12) Order Fixing Defendants' Damage Pursuant to Paragraph 2 of Interlocutory Decree
- (13) Order (directing the deposit of funds with the Clerk of the Court; filed August 15, 1955)
- (14) Findings, Conclusions, Judgment and Decree (filed August 23, 1955)
- (15) Notice of Motion for New Trial and to Amend Findings and Conclusions (excluding the points and authorities attached thereto)
- (16) Order re Exhibit Upon Hearing on Settlement of Findings (filed September 13, 1955)
- (17) Order Denying Defendants' Motion for a New Trial and to Amend Findings and Conclusions
- (18) Order (directing Clerk to execute grant deed; filed October 7, 1955; excluding the grant deed and all other documents attached to the order)
- (19) Notice of Appeal
- (20) Designation of Contents of Record on Appeal (filed in the District Court)
- (21) This Stipulation
- (22) Statement of the Points to Be Relied Upon by Appellants (filed in the Court of Appeals)
- (23) The reporter's transcript of all the proceedings at the trial (November 22, 23, 24, 26, 29, 30, December 1, 1954) with the exception of (a) pages 3 to 52, both inclusive, and (b) the testimony

of Edwin O. Holter, Jr. (November 23, 1954, pages 153-178, both inclusive)

(24) Pages 18 (beginning with line 21) to 22 (ending with line 20), both inclusive, of the reporter's transcript of the oral argument on December 3, 1954

II.

None of the exhibits transmitted to the Court of Appeals need be printed in the transcript. Instead, the parties will either print as an appendix to their respective briefs the exhibits (or parts of exhibits) which can conveniently be printed and which they deem material, or designate in their respective briefs the exhibits (or parts of exhibits) which they deem material but which cannot conveniently be printed.

III.

The parties may also print in their respective briefs such excerpts from the typewritten reporter's transcript of the pre-trial conference of November 8, 1954, as they deem material.

IV.

All exhibits printed or designated in accordance with this stipulation and all excerpts from the reporter's transcript of the pre-trial conference printed in accordance with this stipulation shall be deemed to be material parts of the record on appeal as if they were printed in or otherwise reproduced as part of the printed transcript. All exhibits (or parts of exhibits) designated but not printed may

be considered by the Court of Appeals in their original form.

V.

No part of the record transmitted to the Court of Appeals by the Clerk of the District Court shall be deemed material to the consideration of the appeal unless it is printed in the transcript or printed in one of the briefs or designated in one of the briefs in accordance with the terms of this stipulation.

/s/ CARLETON L. RANK,

/s/ HERMAN COOK,

HARDIN, FLETCHER,
COOK & HAYES,

/s/ CYRIL VIADRO,

Attorneys for Appellants.

/s/ A. B. DUNNE,

/s/ LOUIS L. PHELPS,

/s/ [Indistinguishable.]

DUNNE, DUNNE & PHELPS,
Attorneys for Appellee.

[Endorsed]: Filed January 23, 1956.

No. 14,996

In the

United States Court of Appeals

For the Ninth Circuit

HAROLD L. WARD, et al.,

Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corporation,

Appellee.

Appellants' Opening Brief

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FILE

MAY 18 1956

PAUL P. O'BRIEN, CLERK

SUBJECT INDEX

	Page
Jurisdiction	1
Statement of the Case.....	2
Specification of Errors.....	10
Argument	11
Summary of the Argument.....	11
(1) In a decision binding upon the trial court, this court had previously held that a wilfully defaulting California vendee is not entitled to reinstatement of the contract....	12
(2) Under California law, a wilfully defaulting vendee is not entitled to reinstatement of a time of the essence installment contract terminated by the vendor because of the wilful defaults of the vendee.....	14
(3) The burden is on the defaulting vendee to prove that he suffered a forfeiture or penalty before he can be entitled to any relief. Union failed to prove that it suffered such a forfeiture or penalty. Hence, it should have been denied relief by way of restitution as well as reinstatement	31
(4) (a) In any event, Union should have been denied all equitable relief because it came into a court of equity with hands particularly unclean.....	37
(4) (b) The decision of the trial court is inequitable and unfair	40
Conclusion	42
Appendix	

TABLE OF AUTHORITIES CITED

CASES	Pages
Baffa v. Johnson, 35 Cal. 2d 36, 216 P.2d 13.....	15, 17, 28, 32
Barkis v. Scott, 201 P.2d 830.....	13, 16
Barkis v. Scott, 34 Cal. 2d 116, 208 P.2d 367.....	13, 15, 16
Bird v. Kenworthy, 265 P.2d 943.....	36
Bird v. Kenworthy, 43 Cal. 2d 656, 277 P.2d 1.....	15, 22, 23, 24, 26, 28, 32, 34, 35, 44
Crofoot v. Weger, 109 Cal. App. 2d 839, 241 P.2d 1017.....	15, 20, 21, 22
Fairechild v. Nullan, 90 Cal. 190; 27 Pac. 201.....	29
Federal Farm Mortgage Corporation v. Davis (1942), 132 F.2d 663	12, 15
Freedman v. The Rector, 37 Cal. 2d 16, 230 P.2d 629.....	15, 18, 19, 20, 25, 26, 28, 30
Los Angeles A. T. Co. v. Superior Court, 94 Cal. App. 433, 271 Pac. 363.....	29
Nelson v. Dangerfield, 125 Cal. App. 2d 146, 269 P.2d 953....	25
Odd Fellows' Sav. Bank v. Brander, 124 Cal. 255, 56 Pac. 1109	29
Southern Pacific R.R. Co. v. Allen, 112 Cal. 455, 44 Pac. 796....	29
Starr King School for the Ministry v. Kinne, 146 F.2d 8, certiorari denied, 325 US 850, 89 L.ed. 1970, decided in 1944	12, 15
Veterans' Welfare Board v. Burt, 4 Cal. App. 2d 659, 41 P.2d 587	29
Wuchner v. Goggin, 175 F.2d 261.....	13, 14, 22

STATUTES

Title 28, United States Code :

Section 1291	2
Section 1332	1

Civil Code of California :

Section 1492	29, 30
Section 1670	19, 25, 27
Section 1671	19, 25, 27
Section 3275	9, 13, 16, 18, 21, 23, 30
Section 3294	19, 25, 27
Section 3369	25, 26

No. 14,996

In the

United States Court of Appeals

For the Ninth Circuit

HAROLD L. WARD, et al.,

Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corporation,

Appellee.

Appellants' Opening Brief

This is an appeal from a final judgment of the District Court of the United States for the Northern District of California, Southern Division, Honorable Louis E. Goodman, Judge Presiding.

JURISDICTION

The action was filed by Union Bond & Trust Company, an Oregon corporation, against Blue Creek Redwood Company, Inc., a dissolved Delaware corporation, and a number of individual defendants, all citizens and residents of the State of Michigan. The amount in controversy is in excess of \$3,000.

The jurisdiction of the District Court was based upon Section 1332 of Title 28 United States Code. The juris-

diction of this court is based upon Section 1291 of Title 28 United States Code.

The complaint is found at page 3 of the transcript. The jurisdictional allegations are on pages 4 and 5. The notice of appeal is on page 181.

STATEMENT OF THE CASE

On May 1, 1946, A. K. Wilson, the assignor of appellee, as buyer, and Blue Creek Redwood Company, Inc., the assignor of the individual appellants, as seller, entered into a contract for the purchase and sale of certain timber lands in Humboldt County, California.

For the purpose of brevity, appellee (plaintiff and cross-defendant below) will hereinafter be referred to as Union while appellants (defendants and cross-complainants below) will be referred to as Ward. For the same reason, Ward, rather than Blue Creek Redwood Company, Inc., will be considered to have been the seller and Union, rather than A. K. Wilson, will be considered to have been the buyer.

The contract (Exhibit A attached to the complaint (10-34)*) was more in the nature of an option than an actual contract of sale. Although Ward agreed and bound himself to sell, there was no corresponding obligation to buy on the part of Union.

By making the payments specified in the contract and otherwise complying with its terms, Union could obtain title to the land and to the timber located thereon. It was under no prospective obligation, however, either to make the payments or to comply in any other way with the terms of the contract. On the contrary, it could abandon the contract at any time it chose whereupon it would cease to have any liability thereunder except of course for payments that had

*All references will be to pages of the transcript.

already become due (see clause 12 of the contract, page 21).

In other words, since, as will hereinafter appear, the purchase price was a fixed sum to be paid over a period of ten years, Ward took the risk of any substantial decline in the market while Union stood to reap all of the profits resulting from an increase in timber prices.

The purchase price was \$750,000.* Payments were to be made as follows: \$25,000 down and the balance at not less than \$40,000 a year with Union having the right to log the lands and pay for the logs removed at the rate of \$5.00 per thousand feet (clause 2, pages 11-12). The payments for the logs (called stumpage payments) were to be applied against the minimum annual payments of \$40,000. The entire purchase price was to be paid not later than May 15, 1956 (clause 2(f), page 12).

The stumpage payments were to be made on or before the 20th of the month following the removal of the logs (clause 2(d), page 12).

The contract required Union to scale the logs removed from the land and to provide Ward with copies of the scale slips† and with monthly reports of the total quantity of

*The original purchase price was \$600,000 (clause 2, page 11) but the contract contained an option to acquire an additional tract of land and the timber located thereon for an additional sum of \$150,000 (clause 7, pages 14-15). That option was later exercised by Union.

†After a tree has been felled and cut into logs, each log is sealed or measured to determine the number of feet of merchantable lumber which it contains. In this case, the scaler prepared a scale slip in quadruplicate on which he noted the footage of each log, the area from which the log came as well as other necessary information. One copy of the scale slip was intended for the mill and another for the trucker. The pink copy was eventually to be sent to Ward under the terms of the contract and the original (white) slip was retained by Union (305-6, 537-8).

The scale slips are the only original source of information as to the quantity of logs removed. They served as the basis for a number of permanent books of record, however, including the stumpage

logs removed. The scale slips and the monthly reports were to be sent to Ward with the stumpage payments (clause 11, page 19).

The contract also provided that Union was to pay all current property taxes when due (clause 4, page 13).

As we have already indicated, Ward did not have the right (which the vendor usually has in an installment contract) of suing Union for damages or for the balance of the purchase price.

Under clause 12 of the contract (21), the only remedy available to Ward in the event of a default by Union was the right to cancel the contract, resume possession of the property, retain the payments made by Union and recover unpaid stumpage payments.

Notice of cancellation could not be given, however, unless the default had continued for a period of 60 days after written notice by Ward to Union.

At all times material to this action, Union was owned and controlled by A. K. Wilson and his immediate family, A. K. Wilson being president and in direct charge of all of its affairs (631-2).

Prior to April of 1953, Union itself did no logging (326) although a considerable amount of logging was done by A. K. Wilson through other corporations similarly owned and controlled by him.

On the lands involved in this action, the logging was done by Coast Redwood Company, one of those corporations (which will hereinafter be referred to as Coast), under

book, a running record of the quantities of logs removed from a given area with totals entered daily and accumulated periodically.

Any information that might be needed as to the quantity of logs removed during a given period or as to the amount of stumpage payments to be made to Ward was readily obtainable from that book.

a license from Union (383, 543-4). Although Coast did some logging and road building on those lands prior to 1950, substantial logging operations did not begin until early that year. They continued until June of 1954 when all of the lands covered by the contract situated in Township 12 had been logged. To date, there has been no logging in Township 11.

In the early part of 1953, Coast and A. K. Wilson Lumber Company, another of A. K. Wilson's operating companies, filed petitions under Chapter XI of the Bankruptcy Act (303, 599). Thereafter, they continued operating as debtors in possession until each was adjudicated bankrupt in October of 1954.

As a result of those proceedings, the logging operations of Coast were conducted under the direction and control of a Creditors' Committee. The net proceeds of those operations went to the Creditors' Committee after payment of the operating expenses including the stumpage payments which Coast made to Union (334) and which Union was in turn required to make to Ward under the terms of the contract.

Since the profits from Coast operations went to the Creditors' Committee, Union itself began logging operations in April of 1953, first on lands not covered by the Ward contract and, beginning in June of 1953, on lands which were covered by the contract (306, 341, 536).

In other words, from then on, there were two separate logging operations on the Ward lands (341). Needless to say, Union was required to report and pay for all the logs removed from those lands whether by Coast or by Union itself.

The parties have stipulated that such exhibits as they deem material may be printed as an appendix to their

respective briefs (1003). Pursuant to that stipulation, we have printed, as an appendix to this brief, Defendants' exhibits I, AB and AC.

Exhibit I is a compilation of the payments made by Union showing the date of each payment and the purpose for which it was intended. Exhibit AB is a compilation of notices of default sent by Ward. Exhibit AC is an analysis of Union's performance under the contract between June of 1949 and March of 1954 showing, as to each month during that period, whether or not payments, reports and scale slips were sent on time.

Those exhibits graphically illustrate the conditions under which Union carried out its part of the contract. They show that, after Coast began logging, Union was in default under the contract practically all the time.

Every month but two, Union failed to pay for logs removed by the 20th of the month following their removal. Every month but nineteen, it failed to report the quantity of logs removed by the 20th of the month following their removal. Every month but twenty, it failed to send the scale slips to Ward by the 20th of the month following the removal of the logs.

Only once throughout the entire period of the contract did Union send the necessary scale slips, report and payment to Ward by the 20th of the month following the removal of the logs.

As a result of those repeated defaults, Ward was caused to send a total of 54 default notices to Union.

Some of those defaults must be described in greater detail.

Union failed to send scale slips, monthly reports or payments for logs removed during the months of June, July, August, September and October of 1953, by the 20th of the following month.

On each occasion, Ward caused a notice of default to be sent to Union and, within sixty days from the date of each default notice, Ward received from Union the scale slips, monthly report and payment for the logs which *Coast* had removed from the lands covered by the contract (and for which it had made stumpage payments to Union).

Union failed to send to Ward, however, the scale slips, monthly reports and payments covering the logs which Union itself had removed during that period. Logs having a contract price value in excess of \$35,000 were thus removed by Union, unreported and unpaid for (findings 6 and 7, pages 156-8).

Union also failed to pay the property taxes for the year 1953-54 when due or within sixty days after demand by Ward that they be paid (finding 8, page 158).

As a result of the foregoing defaults and of Union's failure to correct them within sixty days after written notice, Ward terminated the contract as of May 12, 1954 (finding 10, page 159).

On May 20, 1954, this action was filed by Union. The complaint alleged that Union was not in default in any respect under the terms of the contract and that, such defaults as there were, if there were any, were the result of inadvertence and excusable neglect (3-10).

Union prayed for a declaration that the contract was in full force and effect, for its specific performance and for a decree quieting its title to the land (9-10).

The complaint contained a number of other allegations covering miscellaneous matters including a claim for damages allegedly sustained by Union as a result of Ward's attempts to regain possession of the land. The trial court did not find in favor of Union on any of those matters and

they are in no way material to the issues presented on this appeal.

Ward filed an answer and cross-complaint alleging the existence of the defaults, the failure to correct them within sixty days after notice, and the termination of the contract and denying that the defaults were the result of inadvertence or neglect (36-51). Ward prayed that his title to the property be quieted and, in addition, asked for a money judgment covering logs removed and unpaid for as well as the unpaid taxes on the property (49-50).

Union later filed an amended complaint in which it admitted the defaults but still claimed that they were the result of inadvertence and excusable neglect (114-128). In addition to the relief prayed for in its original complaint, Union also asked that it be relieved of the forfeiture which, as it alleged, had resulted from the termination of the contract (127-8).

At the trial, Union primarily sought to prove that its admitted defaults were the result of inadvertence or excusable neglect and took the position that the contract should be reinstated and its title to the property quieted upon payment of the balance due on the purchase price together with Ward's damages.

Ward primarily sought to prove, however, that the defaults were fraudulent, or at least wilful, so that Union was at most entitled to restitution of the excess, if any, of its payments over the damages sustained by Ward.

This court will note that, at the beginning of its opinion, the trial court stated that the parties agreed that Union was entitled to some relief (139). No such concession was made by Ward. Ward of course conceded the law to be that a wilfully defaulting vendee may be entitled to relief against the unjust enrichment of the vendor. It was Ward's position

at all times, however, that, under the facts of this case, there was no unjust enrichment and that, in any event, the conduct of Union was such and its hands were so unclean, that it should be denied all equitable relief.

The trial court found that the defaults were wilful within the meaning of Section 3275 of the Civil Code of California (138, 159).

It also found that a total of approximately \$585,000 had been paid on account of the purchase price (finding 4, page 156); that Union had removed but not paid for logs having a contract price value in excess of \$70,000 (findings 7, 9 and 11, pages 157-159); and that Union had failed to pay the taxes that were due on December 10, 1953. (Finding 8, page 158.)*

The trial court then found and/or concluded that the termination of Union's rights under the contract would result in a forfeiture and penalty and that justice and equity required that the contract be reinstated upon the payment by Union of the entire purchase price together with Ward's damages resulting from the delay in performance (conclusions 2 and 3, pages 159-160).

The court made and entered an interlocutory decree giving Union 45 days to deposit in court the balance due on account of the purchase price (160-1).

A hearing was then held to determine Ward's damages which the trial court limited to the interest on past due payments, the costs of investigating the defaults, the costs and expenses of the action and reasonable attorneys' fees (162-166).

Union deposited in court the additional amount of approximately \$35,000 which the trial court allowed as Ward's

*The total of the taxes due and unpaid as of May 12, 1954, was stipulated to be in excess of \$9,000 (838-9).

damages and a final judgment quieting Union's title to the property was then entered (170-176).

It is from that judgment that this appeal is taken.

SPECIFICATION OF ERRORS

(1) The District Court erred in allowing Union (a wilfully defaulting vendee) to complete the contract (by paying the balance of the purchase price plus attorneys' fees, interest and certain of Ward's costs and expenses) and obtain title to the land since, under the applicable California law, a wilful defaulting vendee is not entitled to reinstatement of a contract terminated by the vendor because of the wilful defaults of the vendee.

(2) The District Court erred in concluding that justice and equity required that Union be allowed to complete the contract since, under the applicable California law, (a) restitution of the amounts paid by him in excess of the damages sustained by the vendor is the only equitable relief from a forfeiture and penalty (assuming, but not conceding, that there was a forfeiture and penalty in this case) to which a wilfully defaulting vendee may be entitled and (b) Union's defaults and conduct under the contract were such as to require in any event that it be denied all equitable relief.

(3)(a) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract.

(b) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract in the absence of (1) a finding as to whether the amounts paid by Union exceeded the damages sustained by Ward and (2) a finding as to the reasonable value of the use of the property during the eight years during which Union was in possession of the property.

(c) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract since (1) there is no evidence in the record as to whether the amounts paid by Union exceeded the damages sustained by Ward and (2) there is no evidence in the record as to the reasonable value of the use of the property during the eight years during which Union was in possession of the property.

ARGUMENT

Summary of the Argument

(1) The trial court should have denied Union relief by way of reinstatement of the contract since, in a decision on the subject binding upon the trial court, this court had previously held that, under California law, a wilfully defaulting vendee is not entitled to reinstatement of such a contract.

(2) Under California law, a wilfully defaulting vendee is not entitled to reinstatement of a time of the essence installment contract terminated by the vendor because of the wilful defaults of the vendee.

Restitution of the excess of his payments over the vendor's damages is the only equitable relief to which he may be entitled. Hence, in this case, Union should have been denied relief by way of reinstatement of the contract.

(3) Before he can be entitled to relief by way of restitution of part of his payments (or, for that matter, to any other relief), a defaulting vendee must show that he suffered a forfeiture or penalty for otherwise there is nothing from which he can be *relieved*.

The burden of proof as to that issue is upon him. Proof of a forfeiture or penalty requires proof of the *unjust* enrichment of the vendor. Whether the vendor was or was not unjustly enriched cannot be determined without proof of

the value of the use of the property while the vendor was deprived of its possession.

In this case, Union failed to prove and the trial court failed to find the value of the use of the property during the 8 years that Ward was deprived of its possession. Without a finding on that issue, there could be no finding of unjust enrichment. Hence, there could be no relief by way of restitution.

(4)(a) In any event, Union should have been denied all equitable relief because it came into a court of equity with hands particularly unclean.

(b) The decision of the trial court is inequitable and unfair for the further reason that *Union* had the right to cancel the contract at any time it chose without incurring further liability thereunder. Hence, Ward should not have been deprived of the right to cancel it for cause (which was the only remedy given him by the contract).

(1) In a decision binding upon the trial court, this court had previously held that a wilfully defaulting California vendee is not entitled to reinstatement of the contract.

Concededly, this case is to be decided on the basis of California law (the contract itself so provides (22)).

This very question (of the right of a defaulting California vendee to reinstatement of a time of the essence contract) was before this court on three recent occasions.

In *Federal Farm Mortgage Corporation v. Davis* (1942), 132 F.2d 663, this court held that, under California law, a defaulting vendee was not entitled to relief following the termination of the contract by the vendor because of the vendee's defaults.

That ruling was reaffirmed in *Starr King School for the Ministry v. Kinne*, 146 F.2d 8, certiorari denied, 325 US 850, 89 L.ed. 1970, decided in 1944.

Finally, on June 3, 1949, this court decided the case of *Wuchner v. Goggin*, 175 F.2d 261. The trial court in that case had granted relief to the vendee and reinstated the contract. This court reversed the judgment. In reversing it, however, it noted that the District Court of Appeal of the State of California, First Appellate District, Division One, had just decided *Barkis v. Scott*, 201 P.2d 830, a case which made a significant change in the law of California.

As will hereinafter appear, a hearing was granted in that case by the Supreme Court of California. As will hereinafter also appear, the opinion of that court, which is reported in 34 C.2d 116, 208 P.2d 367, confirmed the change in the law made by the District Court of Appeal.

The *Barkis* case will be reviewed in detail later on in this brief. It is enough to say at this point that the District Court of Appeal held in that case that a defaulting vendee is entitled to reinstatement of a time of the essence contract if he can bring himself under the provisions of Section 3275 of the Civil Code of California (if he can prove that his default was neither grossly negligent, nor wilful nor fraudulent).

Instead of reversing the judgment in *Wuchner v. Goggin*, supra, with directions to give the defaulting vendee no relief at all, as it would have done prior to *Barkis v. Scott*, supra, this court instructed the trial court to determine whether or not the vendee could bring himself within the provisions of Section 3275. The pertinent part of the opinion is as follows:

“In the instant case we are not so sure that an equitable showing was attempted to be made or that it was not made. We do not intimate nor hint at any conclusion for we entertain none as to what the facts, fully brought out upon the issue presented by the application

of § 3275, Cal. Civ. Code, would show. We do hold that the trial court should try that issue. Accordingly the order will be and is:

“The judgment is reversed and the cause is remanded with instructions to find in accordance with this opinion that the contract had become of no effect prior to the tender of the unpaid balance of the contract purchase price of the property in suit by the trustee, through default in making purchase payment, unless the default should be excused through the application of § 3275, Cal. Civ. Code and the equitable principle expressed in the herein quoted portion of the Glock opinion.” (175 F.2d at page 270.)

In other words, this court held that the defaulting vendee would be entitled to no relief (*that the contract had become of no effect, hence could not be reinstated*) if his default was grossly negligent, wilful, or fraudulent.

That was the law of California as this court found it at the time of *Wuchner v. Goggin*, supra, (a wilful breach means no reinstatement). That should have been the law that governed the decision of the trial court in this case unless of course the law of California was changed after the decision of this court in *Wuchner v. Goggin*, supra.

As will hereinafter appear, the law of California has *not* been changed. A wilfully defaulting vendee continues *not* to be entitled to relief by way of reinstatement of the contract.

(2) Under California law, a wilfully defaulting vendee is not entitled to reinstatement of a time of the essence installment contract terminated by the vendor because of the wilful defaults of the vendee.

In the last few years, the California courts have crystallized the rules under which a defaulting vendee in a time of

the essence installment contract may be relieved of his default. These rules were announced in the following cases which are listed below in chronological order:

Barkis v. Scott, 34 Cal. 2d 116, 208 P.2d 367.

Baffa v. Johnson, 35 Cal. 2d 36, 216 P.2d 13.

Freedman v. The Rector, 37 Cal. 2d 16, 230 P.2d 629.

Crofoot v. Weger, 109 Cal. App. 2d 839, 241 P.2d 1017.

Bird v. Kenworthy, 43 Cal. 2d 656, 277 P.2d 1.

Prior to *Barkis v. Scott*, supra, a defaulting California vendee was generally entitled to no relief at all whether his default was wilful or not. See the decisions of this court in *Federal Farm Mortgage Corp. v. Davis*, supra, and *Starr King School for the Ministry v. Kinne*, supra.

Under the rules announced on July 1, 1949, in *Barkis v. Scott*, supra, and developed in the cases that followed, a defaulting vendee in a time of the essence installment contract may now be entitled to relief in equity. If his default was neither grossly negligent, nor wilful, nor fraudulent, he may obtain the reinstatement of the contract upon payment of the damages sustained by the vendor as a result of the default. *A fortiori*, he may obtain relief against the unjust enrichment of the vendor by way of restitution of part of his payments.

Even if his default was wilful, a defaulting vendee may now be entitled to some relief. In that case, however, he is not entitled to reinstatement of the contract (the form of relief which would give him the benefit of his bargain). The most that he can obtain is relief against the unjust enrichment of the vendor by way of restitution.

We will first demonstrate that, since its defaults were wilful, Union was not entitled to reinstatement of the contract.

In Section (3) of this brief, we will demonstrate that it was not entitled to relief by way of restitution of part of its payments for the simple reason that it failed to establish (and it had the burden of proof on that issue) that Ward was *unjustly* enriched as a result of the termination of the contract.

In Section (4) of this brief, we will demonstrate that it should have been denied all equitable relief for the further reason that it came into court with particularly unclean hands.

We will begin with a review of *Barkis v. Scott*, *supra*, and of the pertinent cases that were subsequently decided.

In *Barkis v. Scott*, *supra*, the vendor brought an action to quiet title following the vendee's default in the payment of two monthly installments (57 installments had been paid without default and the vendee had also made permanent improvements on the property of a value exceeding one-half the contract price).

The trial court found the defaults to have been wilful and quieted the vendor's title without giving any relief to the vendee.

On appeal, the judgment was reversed. The Supreme Court of California held that, under Section 3275 of the Civil Code, the vendee was entitled to the relief for which he asked, namely the reinstatement of the contract.

Section 3275 provides as follows:

“§ 3275. *Relief in case of forfeiture.* Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.”

The case contains a detailed review of the California law on the subject with which we need not otherwise concern ourselves.

We must emphasize, however, that, in order to reach its decision, the court found it necessary to reverse the trial court's finding that the defaults were wilful.

It did not choose to hold, as it could have done had it been so inclined, that the finding was unsupported, but that, in any event, the vendee was entitled to reinstatement of the contract whether his defaults were wilful or not. On the contrary, it made it clear that relief by way of reinstatement of the contract could be granted only a *nonwilfully* defaulting vendee. It is only because, in the opinion of the majority (from which one judge dissented), the finding of wilfulness was not supported by the evidence that that form of relief was allowed.

On March 24, 1950, the Supreme Court of California decided *Baffa v. Johnson*, 35 Cal. 2d 36, 216 P.2d 13. In that case, the action was brought by the vendee to recover his down payment of \$5,000. Having made that payment, the vendee refused to proceed with the contract under circumstances which made his breach wilful.

Assuming, without deciding, that the vendee was entitled to relief against the unjust enrichment of the vendor despite the fact that his breach was wilful, the court nevertheless affirmed the judgment denying him all relief. The court held that he had failed to prove that his down payment exceeded the vendor's damages and that the vendor would accordingly be unjustly enriched by retaining both the property and the payment.

The case thus stands for the proposition that the burden is upon the defaulting vendee to prove that the vendor

would be unjustly enriched by retaining both the property and the payments made by the vendee.

On April 27, 1951, the Supreme Court of California decided *Freedman v. The Rector*, 37 Cal. 2d 16, 230 P.2d 629. In that case, the vendee filed suit for specific performance of a contract on which he had made a down payment of \$2,000. Having made that payment, he wilfully repudiated the contract.

The Supreme Court affirmed the judgment denying him specific performance or damages since, in view of his repudiation of the contract, he was entitled to neither.

Because evidence of unjust enrichment which was lacking in the *Baffa* case was present in the *Freedman* case,* the court was squarely faced, however, with the question of whether a wilfully defaulting vendee is entitled to relief against the unjust enrichment of the vendor.

The court recognized that, although the vendee was not entitled to relief under Section 3275 of the Civil Code (his breach being wilful), he would be penalized in excess of any damages he caused (and the vendor would correspondingly be unjustly enriched) if he were denied all relief. The court held therefore that, independently of Section 3275, he was entitled to restitution of that part of his down payment which exceeded the vendor's damages.

In reaching its decision, the court relied upon the policy of the law against penalties and forfeitures as well as upon certain specific provisions of the Civil Code dealing with the

*The vendor resold the property for \$2,000 more than the vendee had agreed to pay for it. It was therefore apparent that he suffered no damage as a result of the vendee's breach and that he was unjustly enriched to the extent of the difference between the \$2,000 down payment and the broker's commission and other expenses which he himself had to pay.

subject of damages (Sections 3294, 1670 and 1671). Those provisions preclude the allowance of punitive damages in contract cases and authorize liquidated damages in such cases only when it would be impracticable or extremely difficult to fix the actual damages.*

The court held that it was neither impracticable nor extremely difficult to fix the vendor's actual damages. Hence, he could not retain the down payment as liquidated damages.

In our opinion, *Freedman v. The Rector*, supra, compels the conclusion that relief against the unjust enrichment of the vendor (and the resulting penalty to the vendee) is the maximum relief to which a wilfully defaulting vendee can be entitled.

It will of course be argued, however, that, since the vendor had resold the property and relief by way of reinstatement of the contract could no longer be given the vendee, the *Freedman* case is distinguishable.

We do not believe that it is.

*Those sections provide as follows:

“§ 3294. *Exemplary damages, in what cases allowed.* In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.”

“§ 1670. *Contract fixing damages, void.* Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.”

“§ 1671. *Exception.* The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.”

Relief by way of reinstatement of the contract gives the vendee the benefit of his bargain and enables him to make the profit which he would have made had there been no breach. In the *Freedman* case, such relief (if available) would have given the vendee property worth at least \$2,000 more than the price which he had agreed to pay.

Although that \$2,000 profit could not be given him by way of specific performance (since the property had been sold), it could still have been given him by way of damages. This, the Supreme Court expressly refused to do.

To us, it made clear by such a refusal that the only relief to which a wilfully defaulting vendee may be entitled is relief against a loss in excess of the damages sustained by the vendor.

Needless to say, in this case, as it would have been in *Freedman v. The Rector*, supra, (and for the same reason) relief by way of reinstatement of the contract is far more advantageous to the vendee than relief by way of restitution. The price of timber has gone up and is still going up. Hence, if the judgment is affirmed, Union stands to make a very handsome profit on the contract which it wilfully breached, a profit which it obviously would not make if it had been given relief by way of restitution.

Can it be that Ward could have kept Union from making that profit simply by selling the property as soon as the contract was cancelled?

Can it be that the answer to the question of whether Union is entitled to that profit depends upon an event as fortuitous and irrelevant as a sale by Ward to a third party after cancellation of the contract?

On March 20, 1952, the District Court of Appeal for the Third District, decided *Crofoot v. Weger*, 109 Cal. App. 2d

839, 241 P.2d 1017. In that case, the vendee filed suit for reinstatement of the contract following its cancellation by the vendor as a result of the vendee's default in the payment of an installment.

It may incidentally be noted that, of all the recent cases on the subject, *Crofoot v. Weger*, supra, is closest on its facts to this case since it too involved a contract for the purchase and sale of Northern California timber.

Without finding whether the default was wilful or not, the trial court gave judgment for the vendor denying any relief to the vendee.

On appeal, the judgment was reversed with instructions to the trial court to determine whether the default was wilful or not and to grant or deny the relief prayed for (reinstatement of the contract) accordingly.

If the default was not wilful, the vendee was entitled to reinstatement under Section 3275. If it was wilful, he was not entitled to reinstatement. In that case, however, the trial court was instructed to determine whether the vendor had been unjustly enriched by the termination of the contract and to grant the vendee relief on that basis by refunding to him the excess of his payments over the vendor's damages.

At page 842 of 109 Cal. App. 2d, the court stated:

"Likewise the trial court could have found that the loss suffered by the appellants when the respondents terminated the contract was a forfeiture or a loss in the nature of a forfeiture, and such findings, coupled with findings that the breach was neither wilful nor the product of gross negligence would have made proper a reinstatement of the contract upon equitable conditions, if that were still possible, and if not then the recovery by the appellants of such amounts of the payments made as lay within the area of forfeiture.

“In addition to the foregoing, if the court had found that the breach was wilful or grossly negligent so as to prevent equitable relief under section 3275 of the Civil Code there was still the duty of the court to go further and find whether or not the termination of the contract by the respondents for the appellants’ default resulted in the unjust enrichment of the respondents. If such were the result then it would have been the duty of the court to give judgment for so much of the funds paid in as constituted unjust enrichment.”

This court will unquestionably note the analogy between the instructions given to the trial judge in *Crofoot v. Weger*, supra, and the instructions which, three years earlier, it itself had given to the trial judge in *Wuchner v. Goggin*, supra. In both cases, relief by way of reinstatement was held to be available only in the event that the default was not wilful.

The *Crofoot* case was cited to the trial court in this case. As is apparent from its opinion, however, the trial court disregarded it completely, although it is a square holding on the subject, one that should have compelled the trial court to deny reinstatement of the contract in this case and that should compel this court to order a reversal of the judgment.

On November 30, 1954, the Supreme Court decided *Bird v. Kenworthy*, 43 Cal. 2d 656, 277 P.2d 1. In that case, the vendee of a tractor which the vendor had repossessed filed suit to recover either all of the payments which he had made to the vendor (by way of a rescission of the contract) or at least the excess of those payments over the damages sustained by the vendor.

The trial court found that his defaults were wilful and denied all relief to the vendee.

On appeal, the court affirmed the judgment. Since his defaults were wilful, the court held that the vendee was not entitled to relief under Section 3275 of the Civil Code. It held further that he was not entitled to any relief on the theory of unjust enrichment (independently of that section) for the simple reason that it affirmatively appeared that there was no such enrichment.

The contract price was \$29,000 of which the vendee had paid \$24,000. When the vendor repossessed it, the tractor was worth \$28,000.

In other words, as the court itself pointed out, the vendor, who would have received only \$29,000 if the vendee had completed the contract, received a total of \$52,000 (\$28,000 representing the value of the tractor and \$24,000 representing the payments made by the vendee) as a result of the defaults and the cancellation of the contract.

The court nevertheless held that the vendor was not *unjustly* enriched (there is no doubt that he was *enriched*) for the simple reason that the rental value of the equipment while the vendee had it in his possession was \$37,400.

Had he rented it himself during the period of the contract, the vendor would have had \$65,400 (\$37,400 representing the rental value of the equipment and \$28,000 representing the value of the equipment itself). It is only if the payments made by the vendee had exceeded \$37,400 that the vendor would have been *unjustly* enriched.

At page 660 of 43 Cal. 2d, the court stated:

“The purpose of the rule in the Freedman case is to prevent unconscionable inequities resulting from a forfeiture. But where, as here, the vendor would have received greater benefit if the property had remained in his hands than the amount obtained by him because of the forfeiture, there is no inequity.”

Bird v. Kenworthy, supra, is significant not only because it restates the rules announced in previous cases but because it sets forth the measure or yardstick which trial courts must use in determining whether the vendor has been unjustly enriched and the vendee penalized as a result of the cancellation of the contract. That determination can be made only if the value of the use of the property while the vendee was in possession is known.

There can be no *unjust* enrichment if, during that period, the vendor gave more than he received. There can be no penalty or "forfeiture" (although there may well be a loss of profits) so long as the vendee received more than he paid for.

In other words, although the trial court in this case seemed to think otherwise, the fact that, as a result of the termination of the contract, the vendor is left with more than the contract price is completely immaterial.

It will of course be argued that *Bird v. Kenworthy*, supra, is distinguishable because the vendee in that case was not seeking to complete the contract.

It must be noted, however, that, before filing suit, the vendee tendered the balance of the principal and interest due on the contract which tender was rejected by the vendor. Can it be doubted that, if relief by way of reinstatement of the contract had been available to the vendee, the court would not have given him an opportunity to obtain it?

By the payment of an additional \$4,000 or \$5,000 plus interest and damages, the vendee was in a position to obtain a \$28,000 tractor. It is not because he did not ask for it that reinstatement (or at least an opportunity to obtain reinstatement) was denied him. It is simply because, his breach

having been wilful, relief by way of reinstatement of the contract could not be given him.*

Yet, the trial court held in this case that Union was entitled to reinstatement of the contract.

It reasoned as follows:

(1) The Supreme Court of California held in *Freedman v. The Rector*, supra, that Sections 3294, 3369, 1670 and 1671† of the Civil Code “require that a vendee in wilful default be relieved from *any* forfeiture * * *” (emphasis supplied.) (147).

(2) Those sections do not prescribe the form which the relief shall take. Hence, a court of equity may grant relief either by way of reinstatement or by way of restitution.

(3) In this case, reinstatement of the contract is the better and more equitable form of relief.

With all due respect, we must say that the trial court’s reasoning was altogether faulty.

Neither the foregoing sections of the Civil Code nor *Freedman v. The Rector*, supra, require that a vendee in wilful default be relieved from *any* forfeiture.

*In *Nelson v. Dangerfield*, 125 Cal. App. 2d 146, 269 P.2d 953, the court held that a non-wilfully defaulting vendee who had sued for reinstatement and “such further relief as may be agreeable in equity” (and to whom the trial court had granted only reinstatement) was entitled to either reinstatement or restitution. We cannot imagine that, in *Bird v. Kenworthy*, supra, the vendee did not ask for the usual “further relief”. Hence, he could have been given reinstatement had he been entitled thereto.

†Sections 3294, 1670 and 1671 have previously been quoted. Section 3369 (as far as pertinent) provides as follows:

“§ 3369. (Relief not granted to enforce penalty, forfeiture or penal law: * * * 1. Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.”

The code sections do not deal with forfeiture at all but with damages. They require neither that a wilfully defaulting vendee be relieved from a forfeiture nor that he be denied such relief.

As the Supreme Court pointed out in *Freedman v. The Rector*, supra, Section 3369 precludes the vendor's title from being quieted unless he refunds to the defaulting vendee the excess of his payments over the vendor's damages. If he were not required to refund that excess, there would be a violation of Sections 3294, 1670 and 1671 which forbid punitive and liquidated damages in such cases.

Nowhere in *Freedman v. The Rector*, supra, however, is there any indication that the Supreme Court was "pointing the way" (150), as the trial court said in its opinion in this case, towards the result reached by the trial court in this case. Nowhere is there any indication that the court felt either that the code sections require that the contract be reinstated despite the wilful breach by the vendee or that such relief is desirable in the case of a wilful breach.

The decision was intended to protect the vendee from a penalty resulting from the *unjust* enrichment of the vendor; it was not intended to protect him from the loss of the profits which he would have made had he not breached the contract.

Nor was it intended to keep the vendor from being enriched but only to keep him from being *unjustly* enriched.

In *Bird v. Kenworthy*, supra, the vendee lost the benefit of his bargain. Yet the Supreme Court of California held that he did not suffer a "forfeiture". This can only mean that, in the case of a *wilfully* defaulting vendee, the "forfeiture" of which the vendee may be relieved is *not* the loss of the benefit of his bargain. If he is entitled to any relief at all, it is relief from something else, namely from the loss

which would result from his having paid more than the value of what he received.

It is thus clear that the law of California does *not* require that the vendee be relieved from *any* forfeiture.

The trial court took the position, however, that a wilfully defaulting vendee is "penalized" within the meaning of the various sections of the Civil Code if he is denied the benefit of his bargain and the profit which he would have made had he not breached the contract.

In this, the trial court was in error. Under the law of California, such a vendee suffers no penalty so long as the vendor is required to make him whole before his title to the property can be quieted.

And it is certainly not the purpose of Equity to insure the profit which the vendee would have made had he not breached his contract.

The trial court was similarly in error in concluding that, under the Civil Code sections upon which it relied, a court of equity may grant relief either by way of reinstatement of the contract or by way of restitution.

In fact, the only relief which Sections 3294, 1670 and 1671 would justify is relief against an overpayment of damages.

In other words, if it was entitled to any relief at all, Union was entitled to a recoupment of its financial loss, if any. It was entitled to nothing else. Hence the trial court was altogether in error when it declared that *it* had the choice of granting one or the other form of relief.

The trial court finally concluded that, for a number of reasons, including the fact that conflicting estimates of value might make Ward's damages difficult to determine, reinstatement was the better and more equitable form of relief.

We do not agree that Ward's damages would necessarily be difficult to determine. We do agree, however, that they

could not have been determined in this case *on the record presented to the trial court*.

The burden of proving those damages was on Union (*Baffa v. Johnson*, supra). As will hereinafter appear, it was incumbent upon Union, as a necessary part of the showing which *it* had to make on that issue, to prove the reasonable value of the use of the property while it was in possession and Ward was deprived of possession. (Under the rule of *Bird v. Kenworthy*, supra, the value of the property at the date of termination was not actually material).

Without such a showing, there could indeed be no determination of Ward's damages.

Even if we assume, however, that it would have been difficult to determine those damages with all of the necessary evidence before the court, the decision of the trial court cannot be upheld, for it had the effect of penalizing *Ward* because of *Union's* difficulty in proving Ward's damages.

Far from justifying relief by way of reinstatement, the fact that the damages were "impracticable or extremely difficult" to fix (as both Union and the trial court apparently contend) should have compelled the denial of any relief to Union.

After all, it is only because it was neither impracticable nor extremely difficult to fix the damages in *Freedman v. The Rector*, supra, that the court refused to allow the vendor to retain the vendee's payment as liquidated damages.

In other words, far from being an argument in favor of the reinstatement of the contract, the fact that the damages were difficult to determine, if they were, is an argument in favor of allowing Ward to keep the payments as liquidated damages.

The more it is argued that Ward's damages were difficult to determine, the stronger the argument becomes in favor of enforcing the contract according to its terms.

As will hereinafter appear, there was even greater reason and greater equity to allow Ward to retain the payments in this case since the contract denies him the right to sue Union for damages.

In the course of its opinion, the trial court cited and seemingly relied upon some early California cases in which, before quieting the vendor's title to the property, the court gave the vendee an opportunity to complete the contract.*

Those cases are all distinguishable.

In none of them does it appear that the breach was wilful. In none of them was time of the essence, and, finally, in none of them did the contract provide for cancellation in the event of a default by the vendee.

Moreover, in all of them but one (and that one is otherwise distinguishable), the appeal was by the vendee and not by the vendor. Hence, it was not actually contended that the trial court could not allow the vendee to complete the contract and those cases do not actually support the proposition that a defaulting vendee is automatically entitled to reinstatement of his contract.

The fact that, in all of those cases, time was not of the essence, is of course sufficient to distinguish them completely from this case. They were governed by Section 1492 of the Civil Code of California which expressly allows an offer of performance to be made after default, where time is not

**Fairchild v. Nullan*, 90 Cal. 190; 27 Pac. 201; *Southern Pacific R.R. Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109; *Los Angeles A. T. Co. v. Superior Court*, 94 Cal. App. 433, 271 Pac. 363; *Veterans' Welfare Board v. Burt*, 4 Cal. App. 2d 659, 41 P.2d 587.

of the essence, provided that it is accompanied by an offer of compensation for the delay.*

As the trial court itself recognized, however, Section 1492 of the Civil Code is not applicable to this case since, in this case, time was of the essence of the contract.

It is thus apparent that, if the opinion of the trial court is allowed to stand, the express provisions of Section 1492 limiting the vendee's right to reinstatement of the contract to cases in which time was not made of the essence will have been repealed.

It is similarly apparent that, if the opinion of the trial court is allowed to stand, Section 3275 of the Civil Code limiting relief from forfeitures to situations in which the default was not wilful (or grossly negligent or fraudulent) will also have been repealed.

Under the opinion of the trial court in this case, a wilfully defaulting vendee is entitled to get all of the relief available to a vendee whose default was not wilful. Needless to say, Section 3275 is thereby rendered completely meaningless.

It is true that, in *Freedman v. The Rector*, supra, the court declared that the method of relief provided by Section 3275 was not exclusive. It did not hold, however, that all of the relief which can be had under Section 3275 could also be had outside of that section. It merely held that outside of that section, a wilfully defaulting vendee could obtain relief against the unjust enrichment of the vendor.

In one case, the vendee is entitled to the benefit of his

*That section provides as follows:

"§ 1492. *Compensation after delay in performance.* Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime."

bargain. In the other, he is at most made whole as of the time when he entered into that bargain.

It cannot be that the choice as to whether or not to get the benefit of the bargain is to be made by the wilfully defaulting vendee. It cannot be that it is up to him to decide whether to ask for one or the other form of relief depending upon whether the value of the property went up or down.

A nonwilfully defaulting vendee may have that choice. A wilfully defaulting vendee does not (and particularly not when cancellation of the contract is the only remedy available to the vendor).

When time is of the essence and the contract is terminated by the vendor, the wilfully defaulting vendee is no longer entitled to the benefit of his bargain. He is only entitled to relief against the unjust enrichment of the vendor and the penalty which results from that enrichment.

(3) The burden is on the defaulting vendee to prove that he suffered a forfeiture or penalty before he can be entitled to any relief. Union failed to prove that it suffered such a forfeiture or penalty. Hence, it should have been denied relief by way of restitution as well as reinstatement.

Union was entitled to relief, whatever form that relief might take, only if the termination of the contract and the retention by Ward of both the property and the payments resulted in the unjust enrichment of Ward or, conversely, in the infliction of a penalty or of punitive damages upon Union.

As to that issue, the burden of proof was upon Union.

Mere proof that its interest in the property or its rights under the contract were terminated or "forfeited" was not enough. Mere proof of a monetary loss on its part without proof of a corresponding *unjust* enrichment on Ward's part

was not enough either (*Baffa v. Johnson*, supra). Nor was it enough for Union to prove that it had made substantial payments on account of the purchase price and that, at the date of termination of the contract, the property was worth more than the balance remaining to be paid (*Bird v. Kenworthy*, supra).

The test to be applied is not alone the detriment suffered by the vendee as a result of the termination of the contract. It is that detriment compared to the detriment suffered by the vendor as a result of having entered into the contract.

Moreover, the determination of whether the vendor was unjustly enriched and the vendee suffered a penalty is made after and on the assumption that the contract was *cancelled*.

It is with relief from such cancellation that the court is concerned and the question is not whether the vendor is in a better position than he would have been had the contract not been cancelled but whether he is in a better position than he would have been had the contract not been entered into.

It is only if the vendor is in a better position than he would have been had the contract not been entered into that he can be said to have been *unjustly* enriched (and only to that extent that the defaulting vendee can be said to have suffered a penalty).

The fact that the vendor is left in a better position as a result of the cancellation of the contract than he would have been had the contract been fully performed is altogether immaterial (*Bird v. Kenworthy*, supra). And so is the fact that the vendee lost the benefit of his bargain and the profit which he would have made had he performed the contract.

Thus, in this case, before it could be given any relief, it was essential that Union prove that the total of its payments

added to the value of the land (including the improvements) when the contract was terminated exceeded what Ward would have had had the contract never been entered into.

Putting it another way, Union had to prove that the total of its payments (added to the value of the improvements) exceeded the value of what it received from Ward (the use of the property for eight years plus the market value of the timber which it removed therefrom).

Union sought to meet its burden of proof by showing that approximately \$585,000 had been paid on account of the purchase price of \$750,000; that substantial improvements had been made; and that, as of the time of the termination of the contract, the property was worth substantially more than the balance due on the contract.

The trial court found that approximately \$585,000 had been paid on account of the purchase price (156, finding 4); and that substantial improvements had been made (159, finding 12) (in our opinion, the improvements, which consisted solely of access and logging roads, cannot be said to have been substantial. For the purpose of this argument, however, we may assume that they were).

The trial court then found that the termination of Union's rights under the contract resulted in a forfeiture and penalty against which Union was entitled to be relieved (159, finding 13; 160, conclusion 3).

No finding was made as to the value of the property (either with or without the improvements).

Most important of all, no finding was made (*there was no evidence on the basis of which such a finding could have been made*) either as to the value of the use of the land while Union was in possession (from 1946 to 1954) or as to the value of the more than 90 million feet of timber which it removed.

In other words, the trial court "found" that Union was "penalized" by the termination of the contract without determining how much it received under the contract as compared with how much it paid thereunder.

It is our contention that Union could be found to have been *penalized* and Ward could be found to have been *unjustly* enriched only if the value of the use of the land and the value of the timber which it removed were less than the \$585,000 which Union paid (coupled with the value of the improvements).

If the use of the land and the timber removed by Union were worth more than \$585,000 (plus the value of the improvements), Union was not *penalized* by the termination of the contract and Ward was not *unjustly* enriched by keeping the \$585,000 as well as the land in its logged and depleted condition.

It is our further contention that a finding that the vendee was *penalized* and the vendor *unjustly* enriched which is made without considering the value of what the vendee received and the vendor lost while the vendee was in possession is a finding altogether unsupported by the evidence.

The method or yardstick to be used in determining whether the vendee was *penalized* and the vendor *unjustly* enriched is set forth in *Bird v. Kenworthy*, *supra*.

In that case, the court held that, since the value of the use of the property while the vendor was deprived of it (while the vendee was in possession) was in excess of the payments made by the vendee, the vendor was *not* unjustly enriched nor was the vendee *penalized*.

The vendor was certainly better off as a result of the termination of the contract than he would have been had the contract been completed. But he would have been still

better off had the contract never been entered into. Hence he was not *unjustly* enriched. And the vendee was not *penalized* since he had received more than he paid for.

The trial court in this case sought to distinguish *Bird v. Kenworthy*, supra, on the ground that, in that case, "there was no forfeiture" (151, footnote 14).

The trial court apparently overlooked the real significance of that case. It apparently assumed that there would automatically be a forfeiture if Ward were allowed to keep both the land and the payments and looked to the *Bird* case only as a possible aid in deciding what form the relief from that forfeiture should take.

In the last paragraph of the footnote which it devoted to the case in its opinion (151; 128 F.S. 714), the trial court stated as follows:

"Since in *Bird* there was no forfeiture requiring relief, that case affords no guidance in determining the nature of the relief that may be granted in a case such as the present one where there would be a forfeiture requiring relief."

It obviously failed to note that the case was intended to be its guide in determining in the first place whether or not a "forfeiture" or penalty occurred.

In this case, the trial court did not have (because Union did not make it available) the information which it needed to determine whether Union had suffered a "forfeiture".

It did not have the necessary information as to the value of the use of the property from 1946 to 1954 and the market value of the timber removed by Union.

In the absence of the necessary evidence, there could be no finding that Ward was unjustly enriched or that Union suffered a penalty. Conversely, the finding to that effect

which was made by the trial court was clearly unsupported by the evidence.

Needless to say, without such a finding, there could be no conclusion that Union was entitled to relief.

It may be noted that the opinion of the District Court of Appeal in *Bird v. Kenworthy*, 265 P.2d 943 (the very opinion which the Supreme Court of California would not allow to stand), made the very same error which was made by the trial court in this case.

To the trial court in this case, it seemed that a vendee who paid \$585,000 on account of a total purchase price of \$750,000 should be allowed to complete his contract because the vendor would be unjustly enriched if he were allowed to keep both the \$585,000 and the property.

In *Bird v. Kenworthy*, the District Court of Appeal similarly felt that a vendor who paid \$24,000 on account of a total purchase price of \$29,000 would be unjustly enriched if he were allowed to keep both the property (worth \$28,000) and the payments made by the vendee.

At page 948 of 265 P.2d, the court stated that "it is difficult to understand how the judgment that appellant was entitled to no relief whatever can be sustained, as it certainly appears that *here is a case of unjust enrichment if it is possible to have one*". (Italics ours.)

Yet, when it took the case over, the Supreme Court of California held that there was no unjust enrichment.

Since Union failed to prove its case, the judgment should be reversed with directions to deny Union any relief. In any event, it should be reversed with directions to the trial court to determine as a fact rather than assume whether or not Ward was unjustly enriched.

If the value of the use of the land from 1946 to 1954 (including the market value of the timber removed by Union)

was in excess of the amount which Union paid Ward (including the value of the improvements) there was no unjust enrichment, no penalty and no need for any restitution. If it was less than the amount paid, the trial court could find that Ward was unjustly enriched and Union penalized and could accordingly require Ward to refund the difference to Union (less the amounts due Ward for timber removed and unpaid for and for taxes due at the date of termination of the contract) as a condition of having the court quiet his title to the property.

(4)(a) In any event, Union should have been denied all equitable relief because it came into a court of equity with hands particularly unclean.

The trial court found or concluded that justice and equity required that the contract be reinstated.

It is our contention that, far from requiring that it be reinstated, justice and equity required that Union be given no relief at all.

From the very beginning, Union failed to perform the contract according to its terms.

Although the down payment of \$25,000 was to be made in cash, it was in fact made by a six months promissory note which was due on November 25, 1946, and was not paid until July 15, 1948 (see exhibit "A" attached to the answer and cross-complaint, pages 52-3).

And as early as June of 1947, Ward found it necessary to write to A. K. Wilson regarding various failures in performance.

When substantial logging began (January 1950), the situation worsened, never to improve until Ward was finally compelled to cancel the contract.

With regularity, Union failed to send scale slips and reports and to make the payments required by the contract.

Default notices thus became a matter of course and a total of 54 such notices were sent over the 52 month period that preceded the cancellation of the agreement (see exhibits I, AB and AC printed as an appendix to this brief).

With two exceptions (May and June of 1951), every payment was approximately sixty days late and only once (May of 1951) did Union send the required scale slips, report and payment by the 20th of the month following the removal of the logs.

The same was true of taxes. Not once did Union pay the taxes when it was required to pay them by the contract. In fact, it paid the taxes for 1950, 1951 and 1952 only after the property had been sold to the State and after Ward had threatened to terminate the contract (see Defendants' exhibits Z and AG).

Although the foregoing conduct certainly does not show the "clean hands" required to obtain relief from a court of equity, it is as nothing compared with the course of conduct which Union began in February of 1954 in an attempt to conceal from Ward its failure to report and pay for all of the logs which it had removed.

It will be recalled that, in June of 1953, Union itself began logging on the Ward lands along with Coast. Reports of logs removed by Coast were sent by Union to Ward with the usual delay but no information at all as to the logs removed by Union, let alone the reports required by the contract, was sent until after it had become known to Union, in February of 1954, that Ward was investigating the matter and was liable to discover the defaults (348-9).

During the latter part of January, 1954, Ward became suspicious of the correctness of Union's reports and instructed its representative in Humboldt County (French) to investigate (284).

In the course of his investigation, French requested and was shown the Coast stumpage book which contained a detailed daily record of the logs removed by Coast. He also requested, but was denied, access to the Union stumpage book (287-9, 315) although the contract gave Ward the right to inspect Union's books (clause 11, page 19).

He was told that that book, along with other Union records, was in Portland, Oregon (315). In fact, however, records containing all of the information he was seeking were in Arcata and could have been made available to him (Defendants' exhibit T, pages 360-1, 371-2).

It is thus apparent that Union sought to conceal from Ward the extent of its 1953 logging operations. The purpose of the concealment was obviously to avoid or at least delay payment for the logs (see the illuminating comment on the subject made by A. K. Wilson to the effect that he "wasn't in any hurry to have them find out" (549-50).

In fact, it is apparent that Union sought to conceal the true facts not only from Ward but from the trial court itself. Whether or not Union maintained records in Arcata was not in itself material. It became material at the trial only because it was essential for Union to try and cover up its failure to disclose the true facts when French asked for them as well as to prove, if it could, that its failure to report and pay for the logs which *it* had removed (as distinguished from the logs removed by Coast) was the result of inadvertence.

In order to achieve those objectives, Union allowed Owens, its Arcata bookkeeper, to commit perjury at the trial.

On direct examination, Owens testified that no information was available to him in Arcata nor did he maintain

any records as to the amount and origin of the logs removed by Union during the period (310, 359).

It is only after he was confronted on cross-examination with photostatic copies of pages from the Union stumpage book *which he maintained* but which he claimed not to have in his possession (Defendants' exhibit T) that he realized that he had been caught deliberately perjuring himself. Thereafter, he broke down, reversed much of his previous testimony and stayed closer to the truth.

In other words, there was not only no inadvertence on Union's part; there was in fact a deliberate concealment of logs removed and thereafter a deliberate attempt to conceal from the trial court the fact that the concealment of the logs had been deliberate.

How, under those circumstances, the trial court nevertheless found it possible to grant equitable relief to Union is something which we certainly cannot explain. Not only were the defaults wilful, as the trial court found them to be, but the evidence would have justified a finding that they were fraudulent.

Under those circumstances, Union should have been denied all relief.

(4)(b) The decision of the trial court is inequitable and unfair.

As applied to the contract between Union and Ward, the decision of the trial court is particularly inequitable and unfair.

It must be recalled that Ward's sole remedy in the event of a breach by Union was to take the property back regardless of its value and regardless of its condition. Ward could neither sue for damages nor sue for the balance due on the contract.

In other words, the contract was in effect a continuing option to buy the land and log the timber rather than an actual contract of purchase and sale.*

Although there was no finding as to the value of the property at the time of the termination of the contract, it was concededly worth at least as much and probably a good deal more than the balance then due under the contract. Otherwise, Union would not have sought to have it reinstated.

If, however, as a result of a drop in prices or for any other reason, the value of the property had gone down rather than up, so that, at the time of the termination of the contract, it was worth less than the balance which was then due on the contract, there would have been no litigation.

Considering that, under the terms of the contract, Union was in a position to give the property back to Ward if its value went down, it should not, merely because the value of the property went up, be allowed to keep Ward from relying upon the provisions of the contract which entitle Ward to take the property back.

Unlike ordinary contracts of purchase and sale, this contract contained an escape clause for the benefit of the vendee.

Under those circumstances, the provisions of the contract intended for the protection of the vendor should be looked upon with less disfavor than they would otherwise be looked upon.

In the ordinary case, the vendee has no choice. He must pay the full purchase price (or at least damages) even though the value of the property goes down and even though he changes his mind and does not want it any more.

*Although that fact was stressed at the trial, it was completely ignored in both the opinion and the findings of the trial court.

In this case, however, the vendee itself could cancel the contract. If it had done so, the vendor could have invoked neither code sections nor rules of equity in order to obtain relief.

It would seem only fair that the vendor too be allowed to stand on the contract. It would seem that Equity which Union was first to invoke and upon which the trial court so strongly relies should protect all of the parties to the controversy.

CONCLUSION

Under the law of California, Union was not entitled to reinstatement of the contract.

Had it proved the value of the use of the land while Ward was deprived of its possession, it might conceivably have shown itself to be entitled to restitution of part of its payments although its conduct was such that it should have been denied even that form of equitable relief.

The decision of the trial court is in error, however, not only because it fails to apply the applicable California law (which this court itself had previously found to be controlling in such cases). It is also in error because it completely rewrites the contract which the parties (two experienced businessmen dealing at arms' length) had entered into.

Ward had agreed (1) to let Union go into possession and log on the land so long as it complied with the terms of the contract and (2) to take the property back regardless of its condition or value and *release* Union from further liability in the event that Union did not or could not comply with the terms of the contract.

Union in turn was willing to undertake to log on the land and pay the contract price provided, however, that it could

return the land to Ward without subjecting itself to further liability in the event that it did not or could not go on with the contract.

As the trial court rewrote the contract, Ward was still under the *obligation* to take the land back and release Union from further liability should *Union* choose to cancel it. He had lost, however, the corresponding *right* to take the land back should Union fail to comply with the terms of the contract.

Finally, we cannot overemphasize the fact that, if it is allowed to stand, the decision of the trial court will have a very serious and harmful effect on the use of installment contracts and in turn on our entire economy in which such contracts play such a vital part.

The small buyer (whether he is buying a sewing machine or a million dollar tract of land) who cannot afford to pay cash, will find it far more difficult to buy on an installment basis if the law keeps the seller from repossessing the property in the event of a wilful default.

The judgment should be reversed with directions to the trial court to enter judgment in Ward's favor for the amount due him on account of unpaid logs and taxes and to quiet his title to the property.

In the alternative, the case should be remanded to the trial court with directions to try the issue of whether or not a forfeiture in fact occurred.

If none occurred, the trial court should enter judgment in Ward's favor as previously outlined.

If a forfeiture did occur, the trial court should enter judgment in Ward's favor on condition that he refund to

Union the excess of its payments over the damages which he sustained as computed in *Bird v. Kenworthy*.

Dated, Oakland, California,
May 17, 1956

Respectfully submitted

HARDIN, FLETCHER, COOK
& HAYES

CARLETON L. RANK
CYRIL VIADRO

Attorneys for Appellants

(Appendix Follows)



Appendix

DEFENDANT'S EXHIBIT I

BLUE CREEK REDWOOD COMPANY, INC. CONTRACT OF MAY 1, 1946, WITH A. K. WILSON

Date of Check		Amount
5/27/46	Note—Down payment	\$25,000.00
5/15/47	Minimum payment due. 5/15/47.....	40,000.00
5/14/48	" " " 5/15/48.....	40,000.00
1/19/49	For Logs removed in Nov. & Dec., 1948.....	1,103.15
1/28/49	" " " from Sec. 30, Twn. 12-2.....	106.55
2/16/49	" " " in January, 1949.....	384.99
3/18/49	" " " " February, 1949.....	2,505.89
4/19/49	" " " " March, 1949.....	3,808.30
5/16/49	" " " 4/1/49 to 5/15/49.....	4,547.00
6/18/49	Bal. for logs removed in May, 1949.....	1,340.29
7/18/49	Bal. of \$40,000.00 minimum payment due 5/15/49	
(Wire)	for year ending 5/1/49.....	32,091.12
1/3/50	To apply on logs removed in June, 1949.....	2,330.63
(Wire)		
11/22/49	" " " " " in Oct., 1949.....	175.35
3/1/50	Bal. for logs removed in Oct. 1949 and payment	
(Wire)	for logs removed in Nov. 1949.....	3,280.45
3/18/50	Logs removed in December, 1949.....	5,372.50
4/8/50	" " " January, 1950.....	2,541.29
7/20/50	Bal. of minimum due 5/15/50.....	20,412.49
	Logs removed in Feb. 1950.....	5,108.37
	" " " Mar. 1950.....	4,898.43
7/28/50	" " " April, 1950.....	9,005.82
8/25/50	" " " May, 1950.....	16,258.79
9/19/50	" " " June, 1950	7,698.55
10/21/50	" " " July, 1950.....	8,382.44
11/20/50	" " " Aug., 1950	8,680.78
12/19/50	" " " Sept. 1950.....	5,865.01
1/18/51	" " " Oct., 1950.....	1,642.87
2/20/51	" " " Nov., 1950.....	4,962.58
3/17/51	Initial payment on NW¼ Sec. 17 and N½ Sec. 18, T. 12 N., R 2 E., Humboldt Co., Calif., added to contract	25,000.00

Date of Check		Amount
3/17/51	For logs removed in Dec. 1950.....	\$ 2,859.99
4/9/51	" " " " Jan. & Feb., 1951.....	10,954.06
6/18/51	" " " " March, 1951.....	9,837.28
6/18/51	" " " " April & May, 1951.....	24,689.80
7/19/51	" " " " June, 1951.....	10,713.97
10/6/51	" " " " July, 1951.....	11,963.24
10/19/51	Bal. due for logs removed in July, 1951.....	173.62
11/19/51	Logs removed in August, 1951.....	19,381.24
12/18/51	" " " Sept., 1951.....	13,205.14
1/21/52	" " " Oct., 1951.....	6,376.38
2/18/52	" " " Nov. 1951.....	5,453.72
3/20/52	" " " Dec. 1951.....	9,717.18
4/18/52	" " " Jan. 1952.....	8,929.56
5/16/52	" " " Feb. 1952.....	4,763.64
5/16/52	" " " March, 1952.....	2,709.18
6/4/52	March error.....	32.08
7/18/52	" " " April, 1952.....	13,015.40
9/8/52	" " " Bal. April logs.....	24.64
12/16/52	" " " May, June, July and Aug.....	26,365.24
12/20/52	" " " September, 1952.....	8,905.47
1/19/53	" (short).....	31.10
1/21/53	" " " October, 1952.....	11,919.75
2/2/53	" " " November, 1952.....	5,347.81
3/25/53	" " " December, 1952.....	5,255.98
4/23/53	" " " January, 1953.....	4,370.24
5/5/53	" " " (short) Jan. 1953.....	41.20
5/21/53	" " " February, 1953.....	6,215.20
(10/6)	(short) Feb. 1953.....	190.58
6/26/53	" " " March, 1953.....	5,782.11
(10/6)	(short) March, 1953.....	70.67
7/22/53	" " " April, 1953.....	3,111.07
8/21/53	" " " May, 1953.....	8,854.35
9/23/53	" " " June, 1953.....	12,544.36
10/21/53	" " " July, 1953.....	7,358.25
11/24/53	" " " August, 1953.....	7,435.43
12/16/53	" " " September, 1953.....	5,544.12
1/21/54	" " " October, 1953.....	6,509.29
2/17/54	" " " November, 1953.....	10,302.13
3/27/54	" " " December, 1953.....	12,401.86

[Endorsed] : Filed Nov. 26, 1954.

DEFENDANT'S EXHIBIT AB

SCHEDULE SHOWING DATE, ITEM IN DEFAULT AND DATE RECEIVED BY UNION BOND & TRUST OF DEFAULT NOTICES SENT UNION BOND & TRUST COMPANY FROM JANUARY 1, 1950 TO DATE.

Date of Notice	Item in Default	Date Received by Union Bond & Trust Co.
1/13/50	For logs removed in June, 1949—only partial payment, insufficient logging slips and no report received	1/17/50
1/13/50	" " " " October, 1949—only partial payment received, no report or logging slips	1/17/50
1/13/50	" " " " November, 1949—no payment, report or logging slips	1/17/50
1/21/50	" " " " December, 1949—no payment or report	1/24/50
5/17/50	For bal. of minimum due 5/15/50 not received	
	" logs removed in February, 1950—no payment received	
	" logs removed in March, 1950—no payment, report or logging slips	5/22/50
5/27/50	For logs removed in April, 1950—no payment or report	5/31/50
6/28/50	" " " " May, 1950—no payment, report or logging slips	6/30/50
7/21/50	" " " " June, 1950—no payment or logging slips	8/10/50
8/22/50	" " " " July, 1950—no payment or logging slips	8/24/50
9/22/50	" " " " August, 1950—no payment or report	9/27/50
10/23/50	" " " " Sept. 1950—no payment, report or logging slips	10/25/50
11/24/50	" " " " Oct. 1950—no payment, report or logging slips	11/27/50
12/22/50	" " " " Nov. 1950—no payment, report or logging slips	12/26/50
1/16/51	" non-payment of \$25,000.00 in connection with additional timberland added to contract of May 1, 1946	1/18/51
1/23/51	For logs removed in December, 1950—no payment or report	1/25/51
2/23/51	" " " " January, 1951—no payment, report or logging slips	2/26/51
3/21/51	For logs removed in February, 1951—no payment, report or logging slips	3/24/51
4/21/51	" " " " March, 1951—no payment, report or logging slips	4/24/51
5/21/51	" " " " April, 1951—no payment	5/23/51
8/22/51	" " " " July, 1951—no payment, report or logging slips	No record
		Mailed by
		L.S. Fletcher
9/5/51	" " " " June, 1951—no report or logging slips	" " "
9/21/51	" " " " August, 1951—no payment	9/24/51
10/23/51	" " " " Sept., 1951—no payment	10/24/51

Date of Notice	Item in Default	Date Received by Union Bond & Trust Co.
11/21/51	For logs removed in October, 1951—no payment, report or logging slips	11/24/51
1/19/52	" " " " Nov. 1951—no payment	1/19/52
1/25/52	" " " " Dec. 1951—no payment	1/28/52
2/21/52	" " " " Jan. 1952—no payment	2/23/52
3/21/52	" " " " Feb. 1952—no payment	No record sent by L.S. Fletcher
4/21/52	" " " " March, 1952—no payment	4/23/52
5/27/52	" " " " April, 1952—no payment	5/29/52
9/29/52	" " " " May, June, July & Aug, 1952—no payment	10/1/52
10/22/52	" " " " Sept. 1952—no payment	10/24/52
11/21/52	" " " " Oct. 1952—no payment, report or logging slips	11/26/52
12/30/52	" " " " Nov. 1952—no payment, report or logging slips	1/2/53
1/22/53	" " " " Dec. 1952—no payment, report or logging slips	1/24/53
1/24/53	For non-payment of 1st installment of Humboldt County 1952 assessment taxes and tax receipts not received	No record
2/21/53	For logs removed in January, 1953—no payment	2/23/53
3/21/53	" " " " February, 1953—no payment	3/23/53
4/24/53	" " " " March, 1953—no payment, report or logging slips	4/27/53
4/24/53	For non-payment of 2nd installment of Humboldt County 1952 assessment taxes	No record
5/21/53	For logs removed in April, 1953—no payment, report or logging slips	5/25/53
6/23/53	" " " " May, 1953—no payment, report or logging slips	6/25/53
7/21/53	" " " " June, 1953—no payment, report or logging slips	7/23/53
8/21/53	" " " " July, 1953—no payment, report or logging slips	8/24/53
9/22/53	" " " " Aug. 1953—no payment or report	9/24/53
10/19/53	For non-payment of taxes levied in 1950, 1951 and 1952 on lands in Humboldt County covered by timberland agreement of 5/1/46, in the amount of \$12,297.16.	10/21/53
10/21/53	For logs removed in Sept. 1953—no payment or report	10/23/53
11/21/53	" " " " Oct. 1953—no payment or report	11/23/53
12/21/53	" " " " Nov. 1953—no payment or report	12/24/53
12/29/53	For non-payment of 1st installment of 1953 assessment taxes on lands in Humboldt County covered by contract of 5/1/46 and tax receipts not received.	12/31/53
1/21/54	For logs removed in Dec. 1953—no payment or report	1/23/54
4/3/54	" " " " Jan. 1954—no payment, report or logging slips	4/5/54
4/3/54	" " " " Feb. 1954—no payment or report	4/5/54
4/21/54	" " " " March, 1954—no payment or report	4/23/54

[Endorsed]: Filed Dec. 1, 1954.

Red Letters:—Failure to perform. *Black Letters*:—Performand on time, partial performance or no record of date of performance.

Month Logs Removed	Payment by 20th of Following Month	Report by 20th of Following Month	Scale Slips by 20th of Following Month	Month Logs Removed	Payment by 20th of Following Month	Report by 20th of Following Month	Scale Slips by 20th of Following Month
1949				1952			
June.....	*	No	*	January.....	No	Yes	Yes
October.....	*	No	No	February.....	No	Yes	Yes
November.....	No	No	No	March.....	No	Yes	Yes
December.....	No	No	?	April.....	No	Yes	Yes
1950				May.....	No	Yes	Yes
February.....	No	?	?	June.....	No	Yes	Yes
March.....	No	No	No	July.....	No	Yes	Yes
April.....	No	No	Yes	August.....	No	Yes	Yes
May.....	No	No	No	September.....	No	Yes	Yes
June.....	No	Yes	No	October.....	No	No	No
July.....	No	Yes	No	November.....	No	No	No
August.....	No	No	Yes	December.....	No	No	No
September.....	No	No	No	1953			
October.....	No	No	No	January.....	No	Yes	Yes
November.....	No	No	No	February.....	No	Yes	Yes
December.....	No	No	Yes	March.....	No	No	No
1951				April.....	No	No	No
January.....	No	No	No	May.....	No	No	No
February.....	No	No	No	June.....	No	No	No
March.....	No	No	No	July.....	No	No	No
April.....	No	Yes	Yes	August.....	No	No	*
May.....	Yes	Yes	Yes	September.....	No	No	*
June.....	Yes	No	No	October.....	No	No	*
July.....	No	No	No	November.....	No	No	*
August.....	No	Yes	Yes	December.....	No	No	*
September.....	No	Yes	Yes	1954			
October.....	No	No	No	January.....	No	No	?
November.....	No	Yes	Yes	February.....	No	No	?
December.....	No	Yes	Yes	March.....	No	No	?

(*) Partial Performance. (?) No Record of Date. (Agreement cancelled May 12, 1954)

No. 14,996

In the
United States Court of Appeals
For the Ninth Circuit

HAROLD L. WARD, et al,

Appellants,

v.

UNION BOND & TRUST COMPANY,
a Corporation,

Appellee.

Appellee's Brief

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FILED

JUL 18 1956

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Statement of the Case.....	1
The Contract	3
Payments Under the Contract.....	4
Reports Under the Contract.....	7
The Facts Upon Which Appellants Base the Right of Forfeiture.....	9
Summary of the Argument.....	11
Argument	12
I. The Conclusion of Wilfulness Is Contrary to the Evidence.....	12
1. The Circumstances for the Months of June to October, 1953	12
2. The Circumstances for the Month of December, 1953	20
3. The Circumstances as to Taxes.....	20
4. The Defaults Were Not Wilful Within the Meaning of Civil Code § 3275.....	21
II. A. Appellants, by Accepting Payment and Asserting Rights Under the Contract, Have Waived Their Right, if Any, to Declare a Forfeiture.....	26
B. Appellants Have Not Satisfied the Conditions of the Contract for Declaring a Forfeiture, in that No "Written Demand" for Performance Was Made by Appellants.....	34
III. A. Paragraph 12 of the Contract is Invalid Under Civil Code § 1670	36
B. Paragraph 12, by its Terms, Is Inconsistent and Cannot Be Enforced	47
C. By Asserting Rights Under the Contract After the Notice of Cancellation, and by Obtaining a Writ of Attachment, Appellants Have Made an Election of Remedies and Cannot Now Terminate.....	51
IV. Even if the Defaults were Wilful, the Judgment was Proper and Within the Discretion of the Court.....	55
Conclusion	68

TABLE OF AUTHORITIES CITED

CASES	Pages
Atkinson v. Pacific Fire Extinguisher Company, 40 C2d 192, 253 P2d 18	42, 44n
Bailey v. Fox, 78 Cal. 389, 20 Pac. 868.....	33n
Ballard v. MacCallum, 15 C2d 439, 101 P2d 692.....	35n
Bancroft v. Woodward, 183 Cal. 99, 190 Pac. 445.....	33n
Barkis v. Scott, 34 C2d 116, 208 P2d 367.....	22, 23, 25, 25n, 27, 47, 56, 57, 58
Baum v. Grigsby, 21 Cal. 172.....	63n
Baumgarten v. Alliance Assurance Co., 159 Fed. 275.....	38, 43
Beck v. Shepard Fruit Co., Inc., 19 CA2d 590, 66 P2d 188.....	49
Bernard v. Sloan, 2 Cal. App. 737, 84 Pac. 232.....	33n
Better Food Markets Inc. v. American District Telegraph Company, 40 C2d 179, 253 P2d 10.....	42, 44n
Bird v. Kenworthy, 43 C2d 656, 277 P2d 1.....	45, 55n
Boden v. Friedman, 90 CA2d 225, 202 P2d 632.....	32n
Boone v. Templeman, 158 Cal. 290, 110 Pac. 947.....	29, 36
Bryan v. Baymiller, 95 Cal. App. 481, 272 Pac. 1106.....	33n
California Raisin Pool v. Balian, 139 Cal. App. 343, 34 P2d 227....	48
Callahan v. James, 141 Cal. 291, 74 Pac. 853.....	26, 35
Caughlin v. Blair, 41 C2d 587, 262 P2d 305.....	37, 38
Chin Ott Wong v. Title Insurance & Trust Co., 89 CA2d 183; 200 P2d 541	32n
City of Los Angeles v. Krutz, 170 Cal. 344, 149 Pac. 580.....	34
Cohn v. Valentine, 88 Cal. App. 430, 263 Pac. 846.....	63n
Compania Engraw Etc. v. Schenley, 181 F2d 876.....	66
Cross v. Mayo, 167 Cal. 594, 140 Pac. 283.....	33n, 49, 58, 60, 62
Crowell v. City of Riverside, 26 CA2d 566, 80 P2d 120.....	21
DeLaval Pac. Co. v. United C. & D. Co., 65 Cal. App. 584, 224 Pac. 766	54
Drew v. Pedlar, 87 Cal. 443, 24 Pac. 749.....	42
Ebbert v. Mercantile Trust Co. of California, 213 Cal. 496, 2 P2d 776	41, 44n
Electrical Prod. Corp. v. Williams, 117 CA2d Supp. 813, 256 P2d 403	41, 42

TABLE OF AUTHORITIES CITED

iii

	Pages
Fairchild v. Mullan, 90 Cal. 190, 27 Pac. 201.....	56n, 59
Federal Farm Mortgage Corporation v. Davis, 132 F2d 663.....	63
Ferguson v. Blood, 152 Fed. 98.....	64
Flagg v. Andrew Williams Stores, Inc., 127 CA2d 165, 273 P2d 294	36
Fowler v. Vaughan, 86 CA2d 772, 195 P2d 441.....	22
Freedman v. The Rector, 37 C2d 16, 230 P2d 629.....	21, 38, 41, 43, 45, 55, 56
Gates v. Green, 151 Cal. 65, 90 Pac. 189.....	59
Gedstad v. Ellichman, 124 CA2d 831, 269 P2d 661.....	54
Gessner v. Palmateer, 89 Cal. 89, 26 Pac. 789.....	63n
Giberson v. Fink, 28 Cal. App. 25, 151 Pac. 371.....	34
Glassell v. Coleman, 94 Cal. 260, 29 Pac. 508.....	49
Glock v. Howard Etc. Co., 123 Cal. 1, 55 Pac. 713.....	56
Gonzalez v. Hirose, 33 C2d 213, 200 P2d 793.....	26, 33
Goold v. Singh, 88 Cal. App. 339, 263 Pac. 548.....	31
Gouldin v. Buckelew, 4 Cal. 107.....	67
Hansbrough v. Peck, 72 US [5 Wall] 497, 18 L ed. 520.....	61, 61n
Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432.....	33
Hermosa Beach, Etc. Co. v. Law Credit Co., 175 Cal. 493, 166 Pac. 22	33
Hoppin v. Munsey, 185 Cal. 678, 198 Pac. 398.....	33
House v. Piercy, 181 Cal. 247, 183 Pac. 807.....	53
Jameson v. Chanslor-Canfield M. Oil Company, 176 Cal. 1, 167 Pac. 369	35
Johnson v. Hinkel, 29 Cal. App. 78, 154 Pac. 487.....	39
Johnston v. Mulcahy, 4 Cal. App. 547, 88 Pac. 491.....	60
Jones v. Martin, 41 C2d 23, 256 P2d 905.....	54
Keller v. Lewis, 53 Cal. 113.....	56n, 58, 61n, 63
Kent v. San Francisco Savings Union, 130 Cal. 401, 62 Pac. 621.....	63n
Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P2d 71	30, 52
Kittle Manufacturing Co. v. Davis, 8 CA2d 504, 47 P2d 1089.....	53
Knight v. Marks, 183 Cal. 354, 191 Pac. 531.....	42, 44n
Kornblum v. Arthurs, 154 Cal. 246, 97 Pac. 420.....	59

	Pages
La Chance v. Brown, 41 Cal. App. 500, 183 Pac. 216.....	33, 36
LaClercq v. Michael, 88 CA2d 700, 199 P2d 343.....	33n
Laffoon v. Collins, 212 Cal. 750, 300 Pac. 808.....	26
Leballister v. Morris, 59 Cal. App. 699, 211 Pac. 851.....	33
Longmaid v. Coulter, 123 Cal. 208, 55 Pac. 791.....	63n
Los Angeles Auto Tractor Co. v. Superior Court of Los Angeles, 94 Cal. App. 433, 271 Pac. 363.....	60
McCarthy v. Tally, 46 AC 583, 297 P2d 981.....	42, 43
McCartney v. Campbell, 114 W. Va. 332, 171 SE 821.....	19n
McGlynn v. Moore, 25 Cal. 384.....	33, 36
McInerney v. Mack, 34 Cal. App. 153, 166 Pac. 867.....	41
McLane v. Van Eaton, 60 CA2d 612, 141 P2d 783.....	33
Major-Blakeney Corp. v. Jenkins, 121 CA2d 325, 263 P2d 655.....	43, 44n
Marten v. Burns Wine Co., et al., 99 Cal. 355, 33 Pac. 1107.....	33n
Marquardt v. Fisher, 135 Ore. 256, 295 Pac. 499.....	47, 66
Miller v. Modern Motor Co. of Glendale, 107 Cal. App. 38, 290 Pac. 122	26
Miller v. Reidy, 85 Cal. App. 757, 260 Pac. 358.....	32, 35n
Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750.....	63n
Neet v. Holmes, 25 C2d 447, 154 P2d 854.....	33n, 52
Nelson v. Dangerfield, 125 CA2d 146, 269 P2d 953.....	44n, 62
Odd Fellows' Savings Bank v. Brander, 124 Cal. 255, 56 Pac. 1109	59, 61n
Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702.....	21, 22
Petersen v. Ridenour, 135 CA2d 720, 287 P2d 848.....	57, 58, 60, 63
Petrovich v. City of Arcadia, 36 C2d 78, 222 P2d 231.....	42
Pickering Lbr. Corp. v. Whiteside, 54 CA2d 200, 128 P2d 899.....	63n
Portner v. Tanner, 30 Wyo. 85, 216 Pac. 1069, 30 A.L.R. 624.....	50
Redd v. Garford Motor Truck Co., Inc., 205 Cal. 245, 270 Pac. 447..	26
Estate of Reid, 26 CA2d 362, 79 P2d 451.....	63n, 65
Rice v. Schmid, 18 C2d 382, 115 P2d 498.....	42, 44n
Ricker v. Rombough, 120 CA2d Supp. 912, 261 P2d 328..	42n, 48
Rogers, Etc. Co. v. So. California Etc. Co., 159 Cal. 735, 115 Pac. 935	32n
Royer v. Carter, 37 C2d 544, 233 P2d 539.....	38, 39
Ruhl v. Mott, 120 Cal. 668, 53 Pac. 304.....	33n

	Pages
Savings and Loan Society v. McKoon, 120 Cal. 177, 52 Pac. 305.....	26, 35
Scott v. California Farming Co., 4 CA2d 232, 40 P2d 580.....	32n
Sears Roebuck and Company v. Blade, 139 ACA 620, 294 P2d 140..	54
Security-First National Bank Etc. v. Hauer, 47 CA2d 302, 117 P2d 952	49
Sheenan v. McKinstry, 105 Ore. 473, 210 Pac. 167.....	66
Southern Pacific Railroad Company v. Allen, 112 Cal. 455, 44 Pac. 796	55, 60, 61n
Sparks v. Hess, 15 Cal. 186.....	56, 60, 67
Starr King School for the Ministry v. Kinne, 146 F2d 8 (Cert. Den. 325 US 850, 89 L ed. 1970)	63
Steiner v. Rowley, 35 C2d 713, 221 P2d 9.....	53, 54
Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751.....	33
Stratton v. California Land and Timber Co., 86 Cal. 353, 24 Pac. 1065	60, 61n
Swanson v. Madsen, 145 Neb. 815, 18 NW2d 217.....	67
Talbot v. Gadia, 123 CA2d 712, 267 P2d 436.....	26
Universal Sales Corp. v. Cal. Etc. Manufacturing Co., 20 C2d 751, 128 P2d 665.....	26, 35n
Veterans' Welfare Board Etc. v. Burt, 4 CA2d 659, 41 P2d 587.....	60, 61
Wagner v. Shapona, 123 CA2d 451, 267 P2d 378.....	26, 35, 36
Estate of Warner, 168 Cal. 771, 145 Pac. 504.....	33n
Webber v. Herbert, 46 Cal. App. 83, 188 Pac. 819.....	30
Weil v. Barthel, 279 P2d 544, subsequent opinion on rehearing, 45 C2d 835, 291 P2d 30.....	65, 66
Wilson v. Beazley, 186 Cal. 437, 199 Pac. 772.....	33n, 60, 62
Wilson v. Security-First National Bank, Etc., 84 CA2d 427, 190 P2d 975	22
Wuchner v. Goggin, 175 F2d 261.....	63
Yakoobian v. Johnson, 102 Cal. App. 10, 282 Pac. 522.....	49

STATUTES	Pages
Code of Civil Procedure § 580 (b).....	65n
Civil Code of the State of California:	
§ 1442	35
§ 1492	55n, 61, 62
§ 1662	65n
§ 1670	12, 36, 37, 41, 43
§ 1671	41, 41n, 43n
§ 3275	12, 12n, 21, 23, 25, 45, 55, 55n, 58, 62
§§ 3300-3320	37, 37n
§ 3302	42n, 43n
§ 3300	38
§ 3307	38, 38n, 42n, 43n
§§ 3353-3370	38
§ 3359	39, 41
§§ 3384-3395	37
§§ 3406-3408	37
Civil Code of the State of California § 3369 subsection 1.....	40
Military and Veterans' Code § 825.....	61

TEXTS

American Law of Property, Volume III.....	66
14 Minn. Law Review, 342.....	67n
17 Ore. L. Rev. 33, (1938).....	66n
Restatement of Contracts § 357.....	22, 25n
3 Williston on Contracts (Rev. ed. 1936) § 791.....	63

No. 14,996

In the

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For the Ninth Circuit

HAROLD L. WARD, et al,

Appellants,

v.

UNION BOND & TRUST COMPANY,
a Corporation,

Appellee.

Appellee's Brief

STATEMENT OF THE CASE

The case involves an instalment contract for the purchase of real property, under which appellee (purchaser) was in possession, and appellants (sellers) retained title as security for the payment of the purchase price. Appellants gave appellee notice of cancellation of the contract, and in this action seek to enforce a strict forfeiture of all of the rights of appellee under the contract and the interests of appellee in the property.

Appellants, by their statement of the facts, have endeavored to oversimplify the case. There are material omissions, and in some respects statements not justified by the record. The oversimplification results primarily from a complete misconception of the judgment from which they appeal. They argue that the trial

court was in error in reinstating appellee under the contract. The judgment did *not* reinstate appellee under the contract. The judgment was one of strict foreclosure (as distinguished from forfeiture) against appellee.

By its amended complaint (114)¹ appellee admitted, through inadvertence, to partial failures in the making of certain installment payments within the strict terms of the contract, and sought to be reinstated under the contract. Appellants filed a cross-complaint (39) by which they sought to forfeit the rights of appellee, to quiet their title to the land, to permanently enjoin appellee from entering upon the land, *and* for a money judgment for all amounts payable up to the time of the notice of cancellation, including the amounts for which the right to forfeit is claimed and amounts not due under the terms of the contract. They seek, and urge on this court, to stand on the contract and enforce it, and forfeit appellee's rights under it; to compel appellee to cure all of its defaults, for which the right to forfeit is claimed, and still be subjected to forfeiture. In connection with the money judgment sought by appellants, appellants obtained a writ of attachment (165) and levied it against a bank account (166-7) and other property of appellee, of a value far in excess of the amount claimed (707).

The judgment quieted appellants' title to the property (in part, the relief sought by appellants), conditioned, however, on the failure of appellee to pay the full balance of the purchase price, being the sum of \$164,140.03, and damages in the amount of \$35,514.85.² These amounts were paid by appellee, and the money is presently being held by the clerk of the court below for the account of appellants, subject to their withdrawal at any time. By these payments appellants have received the full purchase price of the land, full performance of the contract, and have been fully compensated for all loss or damage sustained.

1. The figures in parentheses, unless otherwise identified, refer to pages of the printed transcript of record.

2. This included attorneys fees in connection with this litigation in the sum of \$20,000.00.

At the time of the judgment and payment by appellee there was due under the contract only \$87,729.17. The condition of the judgment, however, was that appellee pay the full unpaid purchase price, which represented an accelerated payment under the contract, by more than a year, of \$76,410.86. The judgment did not reinstate appellee under the contract.

The Contract.

The contract bears date and was executed on May 1, 1946. Purchaser went into immediate possession, and has continued in possession to the present time.³ The contract is between Blue Creek Redwood Company, Inc., as seller, and A. K. Wilson, as purchaser. Wilson was, and is, President of appellee. The contract by its terms, paragraph 17 (22), contemplated the assignment of the contract by Wilson to a corporation. This was done and appellee was substituted as purchaser, and thereafter continued as such. In 1952, Blue Creek Redwood Company, Inc. was dissolved, and its assets, including its rights under this contract, were distributed to its stockholders, appellants in this proceeding.

At the time of the execution of the contract Harold L. Ward, one of appellants, was President of Blue Creek Redwood Company, Inc., and continued in that position until the dissolution of the corporation (189). Thereafter, Ward, together with Frederick

3. After the notice of cancellation appellants attempted to forcibly retake possession by barricading roads and posting signs (69-70). They were not successful (70-71). They went even further. Rank, attorney for appellants, sought out employees of appellee (754), independent logging contractors logging for appellee (742), and independent log hauling contractors (75, 766) and told them the operation would be shut down and they were without jobs. They knew the logging contractors were logging on other lands (69, 76) but threatened that if they removed any timber they would have to pay for it (743). They knew there were logs to be hauled which did not come from or over these lands. They induced a deputy sheriff, without warrant or authority, to threaten the employees of appellee and the logging contractors (72, 73, 79). As a result, appellee (757, 770) and the independent logging contractors (745) lost key employees. The log haulers took other jobs (768). (Certain of the above references are from the affidavits of Fleckner (65) and Harvey (74). Each testified that his affidavit was true (407, 421).)

S. Strong, Jr., was appointed attorney-in-fact to act on behalf of all appellants in any matter connected with the agreement. The contract was negotiated and executed by Ward (189) and Wilson. During all of the negotiations and at the time of the execution of the agreement, Ward and Blue Creek Redwood Company, Inc., were represented by Carleton L. Rank and Lawrence S. Fletcher, attorneys at law, the attorneys representing appellants on the trial of this case (190). During the negotiations and at the time of the execution of the agreement, Wilson was not represented by independent legal counsel (191). The agreement was drafted and prepared by the attorneys for Ward and Blue Creek Redwood Company, Inc. (190).

Under the agreement, seller agrees to sell and convey, and purchaser agrees to buy certain land located in Humboldt County, California, for a total purchase price of \$750,000.00. The land consists of two parcels, the property described in paragraph 1 (10), for which the purchase price was \$600,000.00, as provided in paragraph 2 (11), and the land described in paragraph 7 (14), for which the purchase price was \$150,000.00.⁴ On payment of the purchase price, appellee was to receive a grant deed and title policy insuring merchantable title (paragraph 3) (12). Appellants refused to execute a deed, and the property has been conveyed to appellee by the clerk of the court (180). Appellee has not received a title policy.

Payments Under the Contract.

The purchase price was to be paid \$25,000.00 down (paragraph 2) (11), and an additional payment of \$25,000.00 at such time as the property described in paragraph 7 became a part of the contract (paragraph 7) (14). These payments were made. There was

4. Contrary to the statement in the footnote on page 3 of appellants' brief, appellee did not have an option to acquire this land in paragraph 7. On the failure of the government to exercise an option which it held for this land "purchaser promises to buy and seller promises to sell" (paragraph 7) (14), and the land became a part of the contract. Appellee was obligated to buy.

also to be paid on the purchase price monthly payments, on the 20th day of each month, in an amount equal to \$5.00 per thousand (M) feet of logs removed from the property during the preceding calendar month (paragraph 2) (12). The contract also provided for minimum annual payments of \$40,000.00 each, payable on May 15 of each year, (paragraph 2) (12) that is, to the extent that the aggregate monthly payments were less than \$40,000.00 per year, the amount of such deficiency was payable on May 15 of each year.

The contract provided that no logging could be conducted, and no logs removed from the land, until a total of \$65,000.00 had been paid, being the initial down payment of \$25,000.00 and the first minimum annual payment of \$40,000.00, payable May 15, 1947. For the first several years the total of the monthly payments did not equal \$40,000.00, and there was therefore paid as the balance due of the minimum annual payment in 1948, \$40,000.00, in 1949, \$32,091.12, and in 1950, \$20,412.49. Thereafter, for each year the monthly payments exceeded \$40,000.00 a year. At the time of the filing of this action there had been paid on account of the purchase price a total of \$585,859.97. These payments were: down payments and balance of minimum annual payments—\$182,503.61, and monthly payments, computed at the rate of \$5.00 per M feet of logs removed from the property—\$403,356.36 (Finding 4) (155-6).

In any event, as provided in paragraph 2(f) (12), the total purchase price was to be paid by May 15, 1956. In conformance with the decree of the court below, the purchase price was paid in full on April 21, 1955.

The total purchase price of \$750,000.00 was fixed. It was not dependent on the amount of timber on the land, or the amount of logs removed, or the amount of logs that could be removed. Appellants repeatedly refer to the monthly payments as payments for logs. They were not. The monthly payments were instalment payments on the contract, on the total purchase price of the land. The footage of logs removed during any month was merely the yardstick adopted by the parties for computing the amount of

each monthly payment. This was not a contract for the sale of logs. It was a contract for the sale of real property. Appellee, as purchaser, had possession of the property, and the right to its full use and enjoyment, and this included the cutting and removal of timber. The interest retained by seller, the bare legal title, was a security interest only. By measuring the monthly payments by the footage of logs removed, the security of the seller was protected. This is further borne out by the fact that on the basis of the cruise⁵ of the timber on this property at the time of the execution of the agreement, the cruise on which purchaser made the agreement (528), the contract price of the timber was \$3.88 per M (213). The monthly payments were fixed at \$5.00 per M. As Mr. Ward testified, the purpose of this was to give the seller an additional margin of security (213), over and above the amounts of the down payments (213) and the minimum annual payments. The \$5.00 per M was not the value placed on the logs, the contract value was \$3.88 per M. The monthly payments at the rate of \$5.00 per M were not payments for logs, they were payments on the total purchase price of the land.

The quantity of logs removed could not affect or change the total purchase price. It could not impair the security of appellants; they had already been paid \$182,503.61 over and above payments for logs removed. Payments were made at the rate of \$5.00 per M for all logs removed. For every thousand feet of logs removed, for which payment was made at the rate of \$5.00, the security of seller was increased \$1.12. Almost twenty-five per cent of each monthly payment made by purchaser represented additional security to seller, so that of the \$403,356.36 paid on the basis of logs removed, almost \$100,000.00 represented additional security to seller, and at the time the complaint was filed appellee had paid, on account of the purchase price, approximately \$280,000.00 over and above the contract value of the logs removed.

5. A cruise is an estimate, by an expert, of the quantity of lumber that may be recovered from standing trees, measured in units of 1000 feet (per M). Almost without exception, timber land is bought and sold on the basis of a cruise.

Reports Under the Contract.

Paragraph 11 of the contract (19), provides that purchaser was to supply to seller, with the monthly payments, monthly reports, including all hauling and scaling slips of purchaser's logging operations. The contract does not specify the form or procedure to be followed.

The property involved in this case has been commonly referred to as the "Ward Lands". The property adjacent to the Ward Lands has been commonly referred to as the "Sage Lands". Appellee is a corporation owned and controlled by the A. K. Wilson family. Coast Redwood Co., Inc. herein referred to as "Coast", was also a corporation of the A. K. Wilson family. Both appellee and Coast, by various agreements, were logging on both the Ward and the Sage lands, at the times here involved.

These lands are a mixed stand of principally Redwood and Fir, with some other species. On the Sage Lands the Fir timber was owned by two other independent corporations, California Barrel Co. and Arrow Mill Co. By agreement with those companies both appellee and Coast were logging the Fir timber on the Sage Lands along with the other species. As a consequence the logging operations being conducted were not controlled by property lines, but were rather dictated by the topography of the land and the location of the roads, in other words, both the Ward and Sage lands were being logged as a single tract. In some instances, from a single logging landing or setting⁶ logs would be taken from both the Ward and Sage lands.

As each tree was felled and cut into logs, each log was branded as coming from either Ward or Sage lands. The logs were then loaded onto trucks, after which they were scaled, by a scaler⁷ employed by appellee. At the time of making his scale, the scaler completed one or more scale slips in quadruplicate for each truck

6. A landing or setting is the place at which the logs are yarded, that is, brought to a central point, and loaded on trucks.

7. The scaler measures the footage of lumber that may be recovered from each log.

load of logs. The scale slips were serially numbered, in three separate classifications; logs removed by appellee or by Coast; logs removed from the Ward or Sage lands; and logs hauled over each of the two main access roads (319). Each copy of the scale slip was a different color. We are concerned here only with the white and pink copies. The scaler retained the white copies, which were accumulated and sent down to the office of either appellee or Coast, as the case might be. After delivery of the logs to the mill, the trucker returned the pink copy to the scaler in the woods, who accumulated them and sent them down to the office of appellee or Coast, as the case might be. From the scale slips it could be determined, as to each log, the land from which removed, the Section number, the number of the landing or setting at which logged, whether logged by appellee or Coast, the species, the total footage, the trucker hauling it, and the mill to which it was delivered. The scaler kept a daily record, cumulative by calendar week and by calendar month, of the total logs hauled from the woods (317), and indicating the totals from the Ward and Sage lands and the totals of the different species of timber. A copy of this record was delivered to a representative of appellant at the end of each week, for that week's operations, and appellants received these weekly, during all of the time here in question (403, 413).

At the end of the month the pink copies were sorted out by serial number, there often being as many as 500 to 600 a month. If any were missing, as was frequently the case (327), photostatic copies of the white copy were made and included with the pink copies (329). They were then bundled up and shipped to appellants. Appellee also prepared a monthly recapitulation of these scale slips, listing each scale slip by number, serially, and showing the section number, landing number and footage of each species removed. These monthly reports were sent to appellants. The monthly payments under the contract were made to appellants on the basis of these monthly recapitulations. Appellants, therefore, received currently, each week, a copy of the scaler's record. They also received the pink copies of the scale slips and the monthly recapitulation.

The Facts Upon Which Appellants Base the Right of Forfeiture.

Appellee made substantial payments under the contract for each of the months of June to October and December, 1953.⁸ By mistake the payments did not cover the full amounts due. By mistake, appellee failed to pay the first instalment of real property taxes for the year 1953-54.

For the months of June to October, 1953, appellee paid the following amounts as instalments due on the purchase price: June—\$12,544.21;⁹ July—\$7,358.25; August—\$7,435.43; September—\$5,544.12; October—\$6,509.29. (Finding 6) (157).

Appellee failed to make payments on account of the purchase price, for each of these months as follows: June—\$1,870.00; July—\$6,795.00; August—\$5,620.00; September—\$9,155.00; October—\$11,275.00 (Finding 7) (158).

The total payments for those months were \$39,391.30. The total amounts unpaid were \$34,715.00.

For the month of December, 1953, appellee paid to appellants the sum of \$12,401.86. (Finding 6) (157). This payment was deficient in the sum of \$1,281.87. The pink slips covering *all* logs removed during December were sent to appellants within the time provided in the contract. By letter appellants were advised¹⁰ of the total quantity of logs removed in December. This was not in the form of the monthly recapitulation previously sent, but was a "report" within the meaning of paragraph 11 of the contract (19). Appellants had both the pink slips and the report at the time they accepted the payment of \$12,401.86.

The pink slips and monthly recapitulations sent by appellee for each of the months June to October, 1953, did not include all

8. For convenience, the parties have referred to the defaults as for the months of June to October and December, 1953. Under the contract the payments were not due until the twentieth day of each succeeding month.

9. Appellants' records, as shown by their exhibit "I", page 2 of the appendix to their brief, shows this payment as \$12,544.36, a difference of fifteen cents.

10. Defendant's Exhibit "S".

of the logs removed during those months, to the extent of the deficiencies in payments for those months. However, during all of that time, appellants' representative, Harvey, received weekly from the scaler in the woods, an employee of appellee, reports which were cumulative for each calendar month, showing the total footage of logs removed, including the logs omitted from the monthly recapitulations and for which the pink slips had not been sent (403). Appellants had these reports prior to the receipt of the payments by appellee.

It is on the basis of these partial non-payments that appellants seek to forfeit the rights of appellee under the contract and in the land.

Appellants endeavor to make considerable point of the fact that over the history of the contract payments and reports were not made by the twentieth of the month. This is in no sense material in this case. Ward testified that up to the time of these defaults all payments had been made within the terms of the contract (222-3). Appellants had been policing the operations of appellee under the contract from the outset, (973) and had never before had occasion to question the accuracy of any report. Appellee was compelled, by circumstances beyond its control, to take full advantage of the provisions of the contract with respect to payment, but it had always made every payment due, and appellants knew that appellee would make every payment as called for by the contract.

The reports prepared by the scaler were delivered to appellants weekly. Every effort was made to forward the pink slips and monthly recapitulations by the twentieth of each month (313, 345). Appellee retained Paul Owens to handle the pink slips and monthly recapitulations and instructed him to send them out as soon as possible (515). Appellee was paying to get the job done, but it was not being done (613). Owens was very busy and understaffed (547-8, 313). The number of transactions was voluminous. The exact date on which they were sent for the months of June to October does not appear, but in any event it was within a day or two of the twentieth of each month, and no more than several days after the twentieth.

Payments were not made by the twentieth of the month, because the money was not available to make them (539). At the time of entering the contract appellants knew that the payments to be made under this contract would have to come from the logging operations (611). Appellants knew that appellee, through subsidiary corporations, was constructing a saw mill and a planing mill (580, 599) and was investing very heavily in the construction of roads on these and adjoining lands (539). Several of appellee's other enterprises were in serious financial distress (543). There had been a severe and costly forest fire on these lands in the previous fall, and during the previous winter there had been most severe and costly floods (580, 599). It was from necessity, not choice, that appellee took full advantage of the contract as to the time of payments. As Wilson testified, "We were on needles and pins all the time", because cash was not available (581).

SUMMARY OF THE ARGUMENT

I.

The trial court concluded that the conduct of appellee was wilful. It was not, and on this ground alone the judgment should be affirmed. When the partial payments were made, it was thought that they paid in full the instalments due, and if it had been known that any further payments were due they would have been paid. The taxes were not paid because it was thought that they had already been paid. In such circumstances, the failure to pay was not wilful.

II.

(A) Appellants, by accepting payment and asserting rights under the contract, with full knowledge of the defaults, have waived their right, if any, to assert a forfeiture.

(B) Appellants have not satisfied the conditions of the contract for declaring a forfeiture, in that no "written demand" for performance was made by appellants.

III.

(A) The provisions of paragraph 12 of the contract, giving to appellants the right to forfeit appellee's interests in the event of

default, are invalid under Civil Code § 1670, as attempting to fix the amount of damage or other compensation to be paid in anticipation of the breach.

(B) Paragraph 12, providing both for cancellation and recovery of unpaid instalments, is, by its terms, inconsistent and cannot be enforced.

(C) By asserting rights under the contract after the notice of cancellation, and by obtaining a writ of attachment, appellants have made an election of remedies and cannot now terminate the contract.

IV.

Even if the defaults of appellee were wilful, it was entitled to be relieved from forfeiture. The judgment from which appellants appeal did not reinstate appellee under the contract. The decree of strict foreclosure entered herein was a proper decree, and was within the sound discretion of the court of equity.

ARGUMENT

I.

The Conclusion of Wilfulness Is Contrary to the Evidence.

The trial court concluded that the failures of appellee to make the payments in strict conformance with the contract were wilful within the meaning of § 3275 of the Civil Code of the State of California.¹¹ Appellee has not appealed from the judgment, but the conclusion of the trial court of wilfulness cannot be supported. Appellants concede that if the defaults were not wilful their appeal is without merit. On that ground alone the judgment should be affirmed.

1. THE CIRCUMSTANCES FOR THE MONTHS OF JUNE TO OCTOBER, 1953.

The facts surrounding the partial defaults for the months of June to October are without dispute, and there is no contrary evidence.

11. The code section is set out in full on page 16 of appellants' brief.

Under dates of July 21, 1953, August 21, 1953, September 22, 1953, October 21, 1953, and November 21, 1953, appellants notified appellee in writing of appellee's failure to report the quantity of logs removed during each of the months June to October, 1953, respectively, and the failure to make payments due on the twentieth day of each of the months of July to November.¹² In response to those written notices, and as payments of the instalments due, appellee made reports and payments to appellants as set forth above at page 9. Each report and each payment was made in the belief and understanding and with the intention that it constituted performance in full for each of those months.

Wilson personally handled all payments to appellants (652). He was directly in charge of forwarding the pink slips and reports to appellants. He thought the payments made covered all logs removed during each of those months (545). He did not know that all logs were not being reported (546). He did not know that the payments were not on the basis of all logs removed (546). If he had known further payments were due, they would have been paid (581). He thought they were paying all that was owed, and he intended to pay on the basis of all logs removed (646). There is no contrary evidence, and there is nothing from which any different inference can be drawn.

For several years prior to June, 1953, Coast Redwood Co., Inc. (Coast) had conducted all logging on these lands. Owens was employed by Coast and supervised the handling of the pink slips and preparation of the monthly recapitulations. In January, 1953, Coast went into reorganization under Chapter XI of the Bankruptcy Act, and Owens left its employ and established offices at Arcata, California, as a public accountant. Thereafter, Owens continued to keep certain of the records of Coast, and continued to supervise the monthly recapitulations to appellants, not as an employee of Coast but as a public accountant, on a fee basis (306). At no time did Owens have any control or supervision over the

12. These "Default Notices" are attached to the cross-complaint of appellants, Exhibit "B", (54-61).

payments made to appellant (311). Wilson travelled a great deal and spent relatively little time in the Eureka area (544). The usual procedure followed was that Wilson would call Owens by telephone several days before a monthly payment was due and enquire of Owens the footage of logs removed during such month. Wilson would then compute the amount of the payment due on the basis of \$5.00 per M feet, and would personally direct either his Portland or Los Angeles office to make the payment (540, 609).

In April of 1953, appellee, for the first time in several years, commenced logging operations for its own account in northern California (306, 536). At that time, Owens was retained, as a public accountant, to maintain certain records of the activities of appellee in northern California, on a fee basis (541).

The principal offices of appellee were, and are, in Portland, Oregon, and the permanent records of the company are maintained at Portland. At the time of his employment by appellee, Owens was instructed that he should maintain only such records as had to do with the receipt and disbursement of funds in the Eureka area, and that all other records of appellee would be maintained in Portland (307). Owens was not advised of the terms of the agreement with appellants (309), and was not advised as to what payments, if any, appellee was required to make to appellants, beyond his long standing instructions that he was to report each month directly to appellants, the total footage of logs removed from this property by Coast.

When appellee commenced logging operations in April, 1953, it was on land not covered by this agreement (536). The same procedure was followed with respect to this logging. Scale slips were made by the scaler. The white copies, and the pink copies after being returned by the truckers, were sent on to Owens. Shortly after Owens commenced receiving these scale slips, he requested of Wilson, in a telephone conversation, advice as to what he should do with them. He was advised that after he had completed the records that he was to maintain, and periodically,

the white slips should be forwarded to Portland, for the permanent records of appellee that were maintained at Portland (311). He was further advised, that inasmuch as no report or payment was to be made to any person on the basis of logs removed from the lands on which appellee was then logging, the pink copies of the scale slips should merely be stored for possible future reference. This was the procedure followed by Owens (311, 312, 542).

Late in June, 1953, appellee completed the logging of the land it had commenced logging in April, and shifted its logging operation to the Ward and Sage Lands (341). Owens received no different instructions from the original instructions in April (344), and therefore continued to periodically send the white copies of the scale slips to Portland and to store the pink copies for possible future reference (312). Wilson, of course, knew when appellee started logging on the Ward Lands. It did not occur to him that any further instructions were necessary to Owens, he assumed Owens knew that reports had to be made to appellants (546). Wilson was wrong in this assumption, but the assumption was based on the fact that Owens had been connected with the Wilson enterprises for many years. After appellee commenced logging on the Ward lands, Owens continued to send to appellants the pink copies of the scale slips covering logging conducted by Coast, and continued to make his monthly recapitulations, including only the logs removed by Coast. During this period Owens continued to store the pink slips covering the logging of appellee, and did not include in his monthly recapitulations to appellants the logs removed by appellee. The result therefore was that for these months only the logs removed by Coast were reported. The pink slips covering logs removed by appellee were not sent to appellants and these logs were not included in the monthly recapitulations. During all of this time, however, all logs removed, including the logs removed by appellee, were included in the cumulative weekly reports made by the scaler to Harvey, appellants' representative.

During this period the same procedure for making payments was followed. Wilson called Owens by telephone and asked him the footage of logs removed for each particular month (610). Owens reported only the logs removed by Coast. Wilson used the figure reported by Owens in computing the amount of the payment, and assumed that it included all logs removed, including those removed by appellee (545). The payments for each of the months June to October were, therefore, deficient by an amount equal to \$5.00 per M feet for logs removed by appellee during each of those months.

There was nothing in the amounts reported by Owens to arouse Wilson's suspicions. The monthly payments for these five months were approximately in the same amounts as they had been in the past (654). Wilson knew that both Coast and appellee were logging on the Ward lands, but he also knew that at the same time and during all of this time both Coast and appellee were also logging on the Sage lands. Wilson knew, currently, the approximate total amount of logs removed by both Coast and appellee during each month, but he did not distinguish between logs removed from the Sage or Ward lands (651), and the payments to appellants were made 60 to 90 days later (652). During all of this time Wilson was very busily engaged in Los Angeles in connection with the reorganization proceedings of Coast (544). He did not receive copies of the monthly recapitulations (655) or the scalers' reports (319). He had to rely on reports received from Owens and others, most of which were by telephone. A mistake was made. The mistake resulted from a misunderstanding between Owens and Wilson. It was an innocent mistake.

Appellants endeavor to argue some element of fraud or wrongdoing on the part of appellee in failing to make these payments; that appellee was motivated by a desire to take logs without paying for them, and intended to deprive appellants of the payments. The arguments are wholly and completely without foundation or basis. The only evidence in the record is of an innocent mistake, and there is nothing in the record to the contrary.

In no circumstance could the failure of appellee to make these payments result in appellee acquiring something for nothing. It could not result in appellee acquiring logs for which it was not obligated to pay. This was not a contract for the purchase and sale of logs, it was a contract for the purchase and sale of real property. The total purchase price was fixed, and was not dependent upon the footage of logs removed. The footage of logs removed fixed only the time of payment, and the only possible effect of the failure to make the payments was to delay the time of payment. The only possible loss to appellants was the loss of the use of the money, a loss for which appellants could be, and were by the decree of the trial court, fully compensated by the payment of interest, not otherwise payable under the agreement.

Neither Wilson nor appellee had any actual knowledge that a mistake had been made. It is true they had the means of knowing, the records were there. But they had no superior knowledge to that of appellants. Appellants were fully advised currently of the total footage of logs removed from the Ward Lands, during each of these months.

Fletcher, one of the attorneys for appellants in this action, represented appellants, and generally supervised their interests in California, including this contract (192, 215). Since the date of the contract, May 1, 1946, appellants had employed someone to police the logging activities (973).

In August of 1952, Fletcher employed French, a timber cruiser (280) on behalf of appellants. French, at that time, was also employed by California Barrel Co. and Arrow Mill Co. French's employment in this connection was to check the logging operations on these lands, to see that the contracts were generally conformed with, to see that the logs were properly branded, to check the logs removed, to see that each of his employers received credit for the logs removed from the respective lands, and to generally supervise and police all of the operations on these properties (192, 282). Fleckner and Harvey were employed by French and appellants (210). Fleckner had direct supervision of these activities

(215, 416). He was familiar with the agreement involved in this action. His principal duty was to see that that agreement was conformed to by appellee (417). He was familiar with the land and the area (429). Harvey devoted himself exclusively to the policing of these lands (417). He was in the woods daily (392). He was thoroughly familiar with the property, he knew all of the roads, he knew the location of the property lines, he knew the location of each landing and setting, he knew the equipment that was being used in the logging operations, he daily checked the branding of the logs, and the logs that were being removed, he knew currently where logging operations were being conducted, he was in daily contact with the loggers and the truckers (392, 393), he knew and understood the serial numbering of the scale slips (406), he received weekly a copy of the scaler's record of the logs removed (405), which record was cumulative for each calendar month, he knew daily everything that was going on in the woods and the logs that were being removed. Harvey had always had full and complete cooperation from the men in the woods and had always received all information for which he asked (413). By the landing number appearing on the report received from the scaler each week he knew whether the logs had come from the Ward or Sage Lands (394), and if it was a mixed landing, he knew currently the quantity of logs from either the Ward or Sage lands removed from that landing (404). He knew the day on which appellee commenced logging on these lands in June, 1953 (402).

Harvey maintained a daily diary of the logging operations and other activities on these properties. This diary was in detail, and included everything that happened, day by day. At the end of each month this daily diary was typed into report form, and a copy of this report was sent monthly to Ward and Fletcher (417). In addition, a monthly report was prepared, from the records obtained from the scalers and from other information obtained by Harvey, of the total logs removed. A copy of this report was sent monthly to Ward and Fletcher (417), by the 10th or 15th of each month (865). Ward and Fletcher received the reports currently and read

them (202, 861) and by letter Fletcher complimented French on the job that he was doing (875). The reports were very comprehensive and detailed.¹³

Both Ward and Fletcher had the French reports before they received the pink slips and monthly recapitulations from appellee (278). It was from the French reports that Fletcher first discovered the defaults (849, 850). It was from the French reports alone that Ward computed the total amount of the defaults for the months of June to October, inclusive, 1953 (272, 278), and his computation was within \$285.00 of the amount found by the trial court to be due for those months. Appellants were as fully advised during all of this time as appellee.

In the circumstances, to suggest that appellee would wilfully default in these payments, is not understandable. Appellee would not jeopardize its rights in this property. The amount of the non-payments is a substantial sum, but compared to the present value of the property of in excess of \$800,000.00, it is small indeed.¹⁴ Appellee knew that appellants had a representative in the woods every day (654), and knew that appellants were fully and currently advised of all of the activities in the woods and of the total footage of logs removed (693). Appellee knew that if any payment required by the contract was not made appellants would know of it promptly, it could not possibly be hidden.

13. The bound volume of these "French Reports" for the year 1953 was admitted in evidence as plaintiffs' exhibit 11. The exhibit cannot be conveniently printed as an appendix to this brief.

14. Appellee has paid in damages to appellants an amount approximately equal to the defaults. In addition, of course, the expense to appellee of this litigation has been very substantial. As the court said in *McCartney v. Campbell*, 114 W. Va. 332, 171 S.E. 821, 822, in holding that a default in payment by a vendee under an instalment contract was not wilful, "moreover, he has paid out in this litigation far more in witness fees and other costs than the amount of his arrears at the time defendant declared the contract forfeited. So we cannot doubt that his position in the matter of payments was assumed in good faith." The court also stated that for non-performance of a money obligation, where full compensation can be made, "relief ordinarily goes in equity as a matter of course, . . ."

2. THE CIRCUMSTANCES FOR THE MONTH OF DECEMBER, 1953.

The partial default for December is of a different nature. The pink slips covering all logs removed during December were sent to appellants. By letter, the total logs removed had been reported. The payment made for December was in the amount of \$12,401.86, which was short by the sum of \$1,281.87. This default was obviously merely an error in mathematical computation. It is the same kind of error as had occurred previously on a number of occasions over the life of the contract. In each of those past instances, appellants had notified appellee of the deficiency, and it was paid (see page 34 below). In this instance, appellants on April 15, 1954, demanded an additional payment for December in the amount of \$2,364.49. This amount was not payable. After the notice of cancellation, appellants reduced this demand to \$1,281.87, which was tendered to appellants on May 21, 1954, but they refused to accept it. In any circumstance it certainly cannot be claimed that this default was wilful.

3. THE CIRCUMSTANCES AS TO TAXES.

The first instalment of taxes for 1953-54 were not paid. It is questionable, in any circumstance, if this is such a default as would justify the cancellation of the agreement. Paragraph 4 of the contract (p. 13) provides:

"Purchaser agrees to pay *for his own account*, * * *"

real property taxes. This provision of the agreement recognizes that purchaser is the owner of the land. Obviously the provision is intended only to protect the security of appellants as vendor.

On October 19, 1953, appellants gave to appellee a notice of default for the non-payment of certain other real property taxes. On December 29, 1953, ten days after the sixty day period provided for in paragraph 12 had expired, Fletcher determined that these other taxes had not been paid and telephoned E. V. Mills, attorney for appellee. Mills stated that he was certain it was merely an oversight and that the matter would be taken care of

immediately. Mills contacted Wilson by telephone and these taxes were paid on that same day, December 29, 1953 (834-5). The notice of default with respect to the present claim of failure to pay taxes was sent out on that same day, December 29, 1953 (Exhibit C to Cross-Complaint (63)). When Wilson paid the taxes as to which Mills had called him, he assumed that that payment paid all taxes then due against the property (583-4). On receipt of the notice of default dated December 29, 1953, the day on which the taxes had been paid, he assumed merely that the notice of default had been sent out prior to the payment made on that day, and that the default had been cured (637). The default was the result of error. It was not intentional. Appellants knew that if the matter had been called to the attention of appellee, the taxes would have been paid, as they had been on December 29, 1953.

4. THE DEFAULTS WERE NOT WILFUL WITHIN THE MEANING OF CIVIL CODE § 3275.

The term "wilful" as used in the statute means a voluntary, conscious act, "intending the result which actually comes to pass; designed; intentional;" (*Parsons v. Smilie*, 97 Cal. 647, 655, 32 Pac. 702). The court in the *Parsons Case* points out that if the default is merely the non-payment of money, for which adequate compensation can be made, the court will generally not enquire whether or not the default was wilful, but will grant relief, as matter of right. In every case in which the default in the payment of money has been found to be wilful, there is some further element beyond the mere non-payment, something to show a repudiation, abandonment, or denial of the contract. So in *Freedman v. The Rector*, 37 C2d 16, 230 P2d 629, the vendee not only defaulted in a payment, he repudiated the contract. In *Crowell v. City of Riverside*, 26 CA2d 566, 80 P2d 120, in finding the breach of a condition of a lease against subletting to be wilful, the court points out that the breach is not the mere failure to pay money for which exact compensation could be made.

In *Wilson v. Security-First National Bank*, 84 CA2d 427, 190 P2d 975, a default in the payment of money under a land contract was found to be wilful on the basis that the vendee stated at the time of the default that he did not pay "because I didn't want the property." In *Fowler v. Vaughan*, 86 CA2d 772, 195 P2d 441, a default in the payment of an instalment under a contract was found to be wilful because the plaintiff not merely failed to pay, he refused to pay and denied that the vendor had any rights in the property.

The Restatement of Contracts § 357, as shown in the Comments to that section, approved by the court in *Barkis v. Scott*, 34 C2d 116, 208 P2d 367, provides that it is not wilful if the default is the result of negligence, error of judgment, mistake of fact or law, insolvency or hardship.

Appellants will urge that the defaults occurred on the twentieth day of each month, the day provided in the contract for the making of the monthly payments. It is true that the payments were knowingly not made on those days. That is not sufficient to make the default wilful. In most instances the payments could not be made by the twentieth of the month because the accounting work necessary to compute the amount of the payment was not completed. Furthermore, as Wilson testified, payments were not made sooner because the funds were not available. This is not a wilful default (Restatement of Contracts § 357; *Barkis v. Scott*, 34 C2d 116, 208 P2d 367).

In any circumstance, the failure to pay on the twentieth of the month was not "intending the result which actually comes to pass" (*Parsons v. Smilie*, 97 Cal. 647, 655, 32 Pac. 702), that is, the failure to pay an amount due under the contract. By the terms of the contract appellee had a period of sixty days after demand within which to perform. Because funds were not available it was necessary that appellee utilize that sixty day period. The intention of appellee was not to fail to pay under the contract, but to pay within the terms of the contract.

If it is to be considered that the defaults occurred, not on the twentieth of each month, but rather on the date that the partial

payments were made, the default was in failing to make the full payment. Wilson testified that at the time the payments were made it was intended that the payments be based on the total footage of logs removed during the respective months. **It was intended that the payments be made in full.** Neither Wilson nor any other representative of appellee knew that the payments were not in full.

With respect to the taxes, Wilson testified that he assumed the default notice had been sent out in ignorance of the payment of taxes that had been made on the same day. **He thought the taxes had been paid.**

In *Barkis v. Scott*, 34 C2d 116, 208 P2d 367, the defaults occurred by the refusal of a bank to honor checks of the vendee because of insufficient funds. The trial court found the default to be wilful. The Supreme Court reversed this finding. The vendee testified that he did not know that there were not sufficient funds in the bank to cover the checks drawn. On the testimony of the vendee alone, that he thought there were sufficient funds in the bank, the court held that the defaults were not wilful within the meaning of § 3275 of the Civil Code.

Appellants argue that in February, 1954, appellee knew, or should have known of the defaults, but did nothing. In the *Barkis Case*, the vendor urged as a ground for supporting the finding of wilfulness that the vendee must have noticed, on receiving his bank statement at the end of the month, that the check to vendor had not been cancelled and that the bank had made a charge for an overdraft. The court points out that the question of wilfulness has to do with the time of the default and not with some subsequent time when the defaulting party learns, or should have learned, of the default. Nor is it concerned with what the defaulting party did or should have done after learning of the default.

On February 11, 1954, Fletcher called Owens by telephone and stated that French would like to examine the records. Owens said "that's fine" (854). Owens told Fletcher he would be glad to show them (315). Owens reported this conversation to Wilson and Wilson told Owens to show French any records that he wanted to see (547, 647).

On February 17 or 18, 1954, French and Fleckner went to the offices of Coast, and requested to see the Coast records. They were immediately made available to them (285, 419). Fleckner checked the amounts reported by appellee for the months of June to October against the records of Coast, showing the logs removed by Coast during that period, and the two were exactly the same (420). He also checked the Coast records against the French reports as to the quantities removed by Coast and found that they were identical (420). Both French (286) and Fleckner (420) knew that appellee had removed logs during each of those months. From that single inspection of the Coast records, and from their own records, they were fully advised as to the defaults, and the amounts still owing (285, 420). This was immediately reported to Fletcher (291).

On February 21 or 22 French went to Owens' office. There was no one else present. At that time French asked to see appellee's records showing the footage of logs removed (315, 288). Owens advised French that he did not have such records, that they were maintained in Portland. He further told French that either the records could be inspected in Portland or they would be sent to Eureka, whichever French desired (289, 315). Wilson had told Owens to tell French that the records could be inspected in Portland or would be sent to Eureka, whichever he preferred (647). French told Owens that he would contact him within a week with respect to the records of appellee, and whether or not he desired that they be sent to Eureka (290, 316).

Appellants, in their brief, accuse Owens of perjury, and accuse appellee of endeavoring to conceal the true facts (which were fully known to appellants at that time), by telling French that the records of appellee were in Portland. The records were in Portland.

Owens was not, as stated in appellants' brief at page 39, appellee's "Arcata bookkeeper". He was an independent public accountant, employed on a fee basis (541). The only records Owens had of the nature requested by French were his own work

records as a public accountant. Neither appellee nor Wilson knew that he had even those records (373). He would not be justified in showing them to French when the official records of the corporation could be made so easily available, and within a matter of several days.¹⁵ The only evidence is of a complete willingness to make the records available to appellants. They had only to request them.

Wilson was satisfied that the investigation by French would disclose any defaults there might be, and if any amount was found to be owing it would be paid (549). He so advised French (549). Neither Wilson nor appellee heard anything further from appellants in connection with this matter until receipt of the notice of cancellation on May 12, 1954. French did not come back as he stated he would (291). French had no further contact with Owens or appellee and no further request was ever made to see the records (291, 316). As time went on Wilson assumed that appellants had satisfied themselves that there was no default (549-550). He thought, in any circumstance, that under the contract, if there was a default, written demand for payment would have to be made (550). In any event, he felt that in fair dealing and in line with the past history under the agreement, that if appellants claimed any default they would advise him.

On the basis of *Barkis v. Scott*, supra, the conclusion of the trial court that the defaults by appellee were wilful within the meaning of Civil Code § 3275 cannot be supported. On that ground alone the judgment should be affirmed.¹⁶

15. The claim of appellants is based on copies of records that Rank obtained from Owens on March 24, 1954, more than a month after French's visit. These were Owens' work records (368). Rank and Owens have known each other for a long time, and have always been very friendly (357). Neither Rank nor appellants ever made any request at any time of Wilson or appellee to examine any of the records of appellee.

16. Even on appellants' theory, from Rank's "testimony" in his cross-examination of Owens, that in February, 1954, Wilson instructed Owens not to report the logs removed by appellee during the months of June to October, 1953, because he couldn't pay for them at that time (376), the defaults, if that would constitute a default, would not be wilful (Restatement of Contracts § 357; *Barkis v. Scott*, supra).

A. Appellants, by Accepting Payment and Asserting Rights Under the Contract, Have Waived Their Right, if Any, to Declare a Forfeiture.

The law abhors a forfeiture. It is very ready to find a waiver of the right to forfeit. The waiver may arise from the acts and conduct of the parties. Any acts evidencing an affirmance of the contract, after the right to forfeit has arisen, will constitute a waiver. The acceptance of any benefit or the assertion of any right under the contract, after the default giving the right to forfeit, will constitute a waiver.

In *Talbot v. Gadia*, 123 CA 2d 712, 267 P2d, 436 the Court said at page 719:

"The law looks with disfavor upon forfeitures, and evidence tending to show a waiver of a forfeiture will be favorably regarded, and the forfeiture will be avoided upon any reasonable showing. The amount of evidence required to establish a forfeiture is much greater than that required to establish a waiver, and the waiver may be implied from the acts and conduct of the parties."

Evidence tending to show a waiver will be looked upon with "kindly eyes", and the court will place a liberal construction on the acts of the parties to find the waiver (*Miller v. Modern Motor Co.*, 107 Cal. App. 38, 290 Pac. 122; *Laffoon v. Collins*, 212 Cal. 750, 300 Pac. 808; *Redd v. Garford Motor Truck Co., Inc.*, 205 Cal. 245, 270 Pac. 447; *Gonzalez v. Hirose*, 33 C2d 213, 200 P2d 793).

Every intendment and presumption is against the person seeking to enforce a forfeiture (*Savings and Loan Society v. McKoon*, 120 Cal. 177, 52 Pac. 305). The party seeking to assert the forfeiture has the burden of proof as to all necessary elements, and as to the performance by him of all conditions to the exercise of the right (*Universal Sales Corp. v. Cal. Etc. Manufacturing Co.*, 20 C2d 751, 128 P2d 665; *Wagner v. Shapona*, 123 CA 2d 451, 267 P2d 378; *Callahan v. James*, 141 Cal. 291, 74 Pac. 853). In each of

the cases hereafter cited, time was expressly declared to be of the essence, and the right to declare a forfeiture for default was given by the contract. To sustain a waiver, the character of the default as wilful or otherwise, is immaterial (*Barkis v. Scott*, 34 C2d 116, 208 P2d 367).

For each of the months June to October and December, 1953, payments were due on the twentieth day of the succeeding month. For each of those months appellants gave written "notice of default." For each of those months, appellee, within the 60 day period, tendered as payment in full of the instalment due, and in full satisfaction of the default referred to in the notice, and appellants accepted and retained, unconditionally, payments as follows: September 23, 1953—\$12,544.36, October 21, 1953—\$7,358.25, November 24, 1953—\$7,435.43, December 16, 1953—\$5,544.12, January 21, 1954—\$6,509.29, March 27, 1954—\$12,401.86. The acceptance of these payments, without more, under the authorities hereafter cited, constituted a waiver of the right to terminate the contract. At the time of the receipt by appellants of such payments, appellants had full and complete information as to the total quantity of logs that had been removed and as to the total amount due for each of such instalment payments.¹⁷ The "notice of default" with respect to taxes was given on December 29, 1953, and the 60 day period expired February 27, 1954. No other demand, request or notice was ever made or given by appellants to appellee for any further performance for any of those months, until after the notice of cancellation of the contract (216, 270).¹⁸ At no time did appellants make any claim of any deficiency in performance by appellee for those months, until after the notice of cancellation of the contract.

17. See discussion at page 17 above. Prior to receipt of the payment for December, 1953, appellants had received all of the pink copies and a report of the total quantity of logs removed.

18. With the exception that, on April 15, 1954, appellants requested of appellee the sum of \$2,364.49, claimed still to be due for the month of December, 1953. This amount was not payable.

Prior to receipt of the payment received on January 21, 1954, for the month of October, Fletcher, from the French report, knew that the payment should be in the approximate amount of \$14,000 to \$15,000 (849). The payment was \$6,509.29. On January 29, 1954, Fletcher wrote to French seeking an explanation of this discrepancy (852). He did not contact appellee. On January 31, 1954, French wrote to Fletcher confirming that there was a deficiency in the payments for the months of June to October (852). On February 18, 1954, French and Fleckner examined the Coast records, and positively confirmed that the logs removed by appellee during the months of June to October had not been reported, and the payments made for those months were deficient and they knew the amount of the deficiency (285, 286, 420). This was immediately reported to Fletcher (291). On March 8 or 9, Fletcher made a full report to Ward, and at that time he knew, without question of the deficiencies (216). On March 19, Fletcher met with Ward and made a full report (218).¹⁹

With that knowledge, appellants accepted, on February 17, 1954, payment for the month of November, 1953, in the amount of \$10,302.13. On March 27, 1954, appellants accepted payment under the contract in the amount of \$12,401.86. On April 2, 1954, appellants gave to appellee "notice of default," and asserted rights to performance under the contract. On April 15, 1954, appellants made further demand on appellee for the sum of \$2,364.49, claimed to be due, under the contract, for the month of December, 1953. On April 21, 1954, appellants gave to appellee a "notice of default", under the contract, for the payment due on April 20, 1954. Up until April 21, 1954, appellants continued to assert rights under the contract, and continued to treat it as a subsisting agreement. No further communication of any kind was had between the parties until May 12, 1954, when appellants served on appellee their notice of cancellation. There can be no

19. The issue of waiver was raised on the trial (395). There is no finding as to when appellants acquired knowledge of the defaults, but the evidence is undisputed, and comes from Ward and appellants' agents.

question that the conduct of appellants waived the provision of the contract that time was of the essence, and the right to cancel the contract, for all defaults which accrued prior to April 21, 1954. We are not concerned here with the more difficult problem of finding a waiver of the time provision with respect to subsequent or future payments or defaults, because there were none.

The leading case in California is *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947. The vendee, in possession, sued for specific performance of an instalment contract for the sale of land. The vendor asserted a forfeiture for failure to make payments when due. The vendor had accepted payments under the contract, and at the time of accepting the last payment made, the vendee was still in substantial default. The court held that there could be no question that by the acceptance of this last payment the vendor had waived the time provision of the contract and the right to forfeit for any and all defaults which had accrued to the time of that payment, and the court said at page 294:

"The general rule on the subject is thus stated by Mr. Pomeroy: 'A condition that the title shall be made, or the price shall be paid, on or before a day named may be waived by the party entitled to performance; and if such party thus waives the exact performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture, and therefore, a defense.' (Pomeroy on Contracts, sec. 337.)

" 'The one entitled to insist upon a punctual performance by the other or else that the agreement be ended, may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default.' (Pomeroy on Contracts, sec. 294.)

* * * * *

"These authorities make it clear that the acceptance of payments of installments on the price by Templeman, without objection long after they had become due, was a waiver of

all breaches which had occurred at or prior to the time such payments were actually made, and that he could not afterwards insist upon a forfeiture on account thereof. On April 24, 1903, when the last payment was made, after crediting that payment, there still remained due and unpaid the two installments for March and April of that year, and all the interest accrued to that date. As to these breaches the forfeiture was waived. The respondent does not seriously dispute this."

The court went on to hold, in the circumstances of that case, that the conduct of the vendor constituted a waiver not only of defaults accruing to the date of the last payment, but also with respect to future payments and defaults. We are not concerned with that problem here.

Webber v. Herbert, 46 Cal. App. 83, 188 Pac. 819 (Hearing denied by Supreme Court) was an action by a vendor to quiet his title. There was an instalment contract for the sale of land, under which the vendee was bound to pay taxes. The contract provided that time was of the essence and for forfeiture in the event of default. A default in payment occurred, and after that time the vendor demanded of vendee that he pay taxes. It was held that this constituted a waiver of the right to declare a forfeiture, and the court said at page 85:

"Neither serious consideration nor citation of authority is necessary to support the conclusion that no party to a contract can insist on the performance of a current condition, such as the payment of taxes, and thereafter repudiate the contract for a prior breach of which he must have known. A court of equity does not permit parties who seek its aid thus to blow hot and cold."

The court went on to state that the rules were so well established that this appeal by the vendor was frivolous, and assessed damages against the vendor for the appeal in the sum of \$250.00.

Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P2d 71, was an action to forfeit an oil lease. Lessee agreed to drill certain wells, which he failed to do. The lessor nevertheless

continued to accept royalty payments. The court held this was a waiver of the right of forfeiture and said at page 440:

"The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. [citing cases] The Rule is also stated in Ruling Case Law as follows: 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.'"²⁰

Goold v. Singh, 88 Cal. App. 339, 263 Pac. 548 was an action by a vendor to quiet his title on the basis of a forfeiture. Under the contract the vendee had the right to subdivide and sell parts of the land, with the provision that he account to the vendor, and pay to the vendor a part of the monies received, to apply on the purchase price, (as in our case appellee had the right to remove logs and the obligation to make payments on the purchase price on the basis of the logs removed). The vendee sold some of the

20. The court also said, at page 445, "the theory upon which the courts hold that acceptance of rent, after breach of the covenants of the lease with knowledge of all the facts surrounding said breach, constitutes a waiver of such breach is that by accepting the rent under these circumstances the lessor recognizes the existence of the lease, and that it is inconsistent and not permissible for a party to recognize the existence of a lease and accept benefits under it, and at the same time claim that it is forfeited and seek to recover the fruits of a forfeiture."

land, but failed to account or make any payment to vendor. Subsequently the vendor accepted a payment of interest under the contract. The court found that at the time the interest payment was accepted, the vendor had no knowledge of the prior breach, and therefore found that there was no waiver. The court states, however, that if at the time of acceptance of the payment of interest the vendor had known of the prior breach it would have constituted a waiver.

Miller v. Reidy, 85 Cal. App. 757, 260 Pac. 358 (Hearing by Supreme Court denied), was an action to forfeit a lease for an assignment by a lessee without the consent of the lessor, contrary to the terms of the lease. The court held that the acceptance of rent after the breach waived the right of forfeiture. The receipt given by lessor on acceptance of the rent recited that it was without waiving any of the rights of lessor. The court held that this was without effect to prevent the waiver, and in fact merely evidenced the intention of the lessor to continue to assert rights under the lease and to treat it as a subsisting agreement.²¹

The acceptance of a payment under the contract, without more, was held to have waived the right to declare a forfeiture for any default occurring prior to the date of such payment in each of the following cases:

21. In *Rogers, Etc. Co. v. S. California Etc. Co.*, 159 Cal. 735, 115 Pac. 934, it was held that the vendor by agreeing to pay the vendee \$1,500.00 for his interest under the contract waived his right to declare a forfeiture.

In *Scott v. California Farming Co.*, 4 CA 2d 232, 40 P2d 580, it was held that the vendor waived his right to forfeit by negotiating with the vendee as to the default and by taking an assignment of the vendee's interest under the contract.

Chin Ott Wong v. Title Insurance & Trust Co., 89 CA 2d 183, 200 P2d 541 (hearing denied by Supreme Court), was an action by the vendor to recover monies paid into escrow by the vendee, on a forfeiture. The final payment was to be made by May 29, 1946, but on July 15, 1946, when the payment had not been made, the parties amended the escrow instructions. It was held that by treating the contract as alive and subsisting the vendor had waived his right to forfeiture.

In *Boden v. Friedman*, 90 CA 2d 225, 202 P2d 632, prior to the time that all instalments were due, the parties negotiated for the payment of the full purchase price. It was held that this constituted a waiver.

Gonzalez v. Hirose, 33 C2d 213, 200 P2d 793;
Hoppin v. Munsey, 185 Cal. 678, 198 Pac. 398;
Hermosa Beach Etc. Co. v. Law Credit Co., 175 Cal. 493,
 166 Pac. 22;
Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751;
Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432;
McGlynn v. Moore, 25 Cal. 384;
McLane v. Van Eaton, 60 CA 2d 612, 141 P2d 783;
Leballister v. Morris, 59 Cal. App. 699, 211 Pac. 851;
LaChance v. Brown, 41 Cal. App. 500, 183 Pac. 216.²²

On February 22, 1954, French met with Owens, and stated that he would be in further touch with Owens within the week. Expecting that French would be back and that the matter would be fully investigated jointly to determine if there had been a default, appellee did nothing. Neither French nor any other representative of appellants ever contacted appellee again with respect to this matter but rather continued to treat the contract as subsisting and in full effect.

Rather than contact appellee, appellants concealed their intentions. This is obvious from French's failure to further contact Owens or appellee. It is clear from the letter of April 26, 1954, from Rank to French (part of plaintiff's Exhibit 10) in which Rank directed French "* * * just go on as you have been without saying anything to anybody about our thinking." In a letter dated April 30, 1954, from French to Rank (part of plaintiff's Exhibit 10), French advised "* * * due to the recent developments, we

22. Similarly, if a party to a contract has a right to rescind, for fraud or otherwise, he must act promptly, and any delay, or any act affirming the contract or treating it as subsisting and in effect, or asserting rights under it, will waive the right to rescind. *Neet v. Holmes*, 25 C2d 447, 154 P2d 854; *Wilson v. Beazley*, 186 Cal. 437, 199 Pac. 772; *Bancroft v. Woodward*, 183 Cal. 99, 190 Pac. 445; *Estate of Warner*, 168 Cal. 771, 145 Pac. 504; *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283; *Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304; *Marten v. Burns Wine Co. et al.*, 99 Cal. 355, 33 Pac. 1107; *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *LeClercq v. Michael*, 88 CA 2d 700, 199 P2d 343; *Bryan v. Baymiller*, 95 Cal. App. 481, 272 Pac. 1106; *Bernard v. Sloan*, 2 Cal. App. 737, 84 Pac. 232.

have tried not to be conspicuous in the nature of some information."

Over the history of the contract if appellants claimed a deficiency in a payment for a particular month, appellee would make the payment without dispute.²³

As Fletcher testified (832-835), on December 29, 1953, 10 days after the 60 day period had expired, he called Mills and Mills called Wilson respecting certain taxes. The taxes were paid that day.

Certainly appellee could expect that this practice would be followed. In the circumstances appellants are now estopped to assert a forfeiture on the basis of those defaults. *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371; *City of Los Angeles v. Krutz*, 170 Cal. 344, 149 Pac. 580, and cases above cited.

(B) Appellants Have Not Satisfied the Conditions of the Contract for Declaring a Forfeiture, in that No "Written Demand" for Performance Was Made by Appellants.

The notices on which appellants based their right to declare a forfeiture were insufficient under the contract. By the terms of paragraph 12 (21) the right of appellants to declare a forfeiture is conditioned on the failure of appellee to perform for a period of sixty days "after written demand by seller for such payment or performance, * * *". The only "written demand" by appellants were the so-called "notices of default", copies of which are attached to appellants' cross-complaint (54-63). Each of the notices is very general in terms, and the notices for the months of June to October and December, 1953, are identical. The notices merely advise appellee that appellants had not received performance and notify appellee of its default under specified paragraphs of the contract. They do not give notice of the particulars

23. As appears from defendant's exhibit "I" set out in full at pages 1 and 2 of the appendix to appellants' opening brief, such payments were made, after request, on October 19, 1951, June 4, 1952, September 8, 1952, January 19, 1953, May 5, 1953, October 6, 1953 and October 6, 1953.

of the default, or the amount to be paid. They are not a demand for performance, and don't even request the performance. With respect to taxes, appellants were at least as well advised as appellee as to the amount due, the land was assessed to appellants and they received the tax bills. With respect to the defaults for the months of June to October and December, 1953, appellants had the information, and certainly were fully advised prior to the notice of cancellation. For the months of June to October and December appellee rendered some performance, and made some payments, which were accepted and retained by appellants. No further or other demand or notice was made.

Forfeitures are never favored by the courts and every intentment and presumption is against the person seeking to enforce a forfeiture. (Civil Code, § 1442; *Savings and Loan Society v. McKoon*, 120 Cal. 177, 52 Pac. 305.) The person seeking to enforce a forfeiture has the burden of proving every essential element to the right, and full and strict compliance with any and all conditions to the assertion of the right. (*Callahan v. James*, 141 Cal. 291, 74 Pac. 853; *Wagner v. Shapona*, 123 CA2d 451, 267 P2d 378).

If an agreement can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it.²⁴

Jameson v. Chanslor-Canfield M. Oil Co., 176 Cal. 1, 167 Pac. 369, was an action to terminate a lease. It was argued by lessor that the only purpose of the notice or demand was to give the lessee the information. The court rejected this argument and stated, at page 6:

"But the contract measures the rights of the parties in this respect, and, being a contract regarding a forfeiture and to

24. "A contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible." (*Universal Sales Corp. v. Cal. Etc. Manufacturing Co.*, 20 C2d 751, 771, 128 P2d 665.)

"* * * the construction which avoids forfeiture must be made if it is at all possible." (*Ballard v. McCallum*, 15 C2d 439, 444, 101 P2d 692.)

"He who claims a forfeiture must have closed every avenue of escape to his opponent." (*Miller v. Reidy*, 85 Cal. App. 757, 761, 260 Pac. 358, hearing denied by Supreme Court.)

be strictly construed, its requirements must be fully met before the right depending thereon can be complete."

It was also argued in that case that the strict compliance with the notice and demand had been waived by the prior conduct of the parties. The court also rejected this argument and held, at page 8, where the language of the contract is clear it cannot be varied by the subsequent conduct of the parties.

To the same effect are *Flagg v. Andrew Williams Stores, Inc.*, 127 CA2d 165, 273 P2d 294, and *Wagner v. Shapona*, 123 CA2d 451, 267 P2d 378.

A demand on which a forfeiture may be based must be definite and specific (*La Chance v. Brown*, 41 Cal. App. 500, 183 Pac. 216; *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947), and must specify the amount payable to satisfy the demand (*McGlynn v. Moore*, 25 Cal. 384).

It is submitted that the "notices of default", particularly in the light of the partial performance rendered, and accepted and retained by appellants, were not sufficient under the contract to declare a forfeiture.

III.

(A) Paragraph 12 of the Contract Is Invalid Under Civil Code § 1670.

Paragraph 12 (21) provides that on default seller shall have the right to cancel the contract, resume possession of the property, retain all payments made and recover the sum of \$5.00 per M for all timber cut and removed prior to the time that seller regains possession.

Section 1670 of the Civil Code of the State of California provides:

"Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Paragraph 12 of the contract is an effort to fix "the amount of damage to be paid, or other compensation to be made, for a breach" of the contract, and falls squarely within § 1670.

The remedies available under a contract are fixed by the Civil Code. In certain circumstances there could be a right of rescission (Civil Code §§ 3406-3408), which results in a complete abrogation of the contract. After rescission, the relationship of the parties is as though the contract had not been made, and both parties must be put into the positions they would have been in, if the contract had not been made. If this is not possible the remedy is not available. Appellants did not rescind, rather they are seeking to enforce the contract.

The alternative remedy to rescission is for damages, (Civil Code §§ 3300-3320) which is based on the promised performance. The damages are substituted for performance (*Caughlin v. Blair*, 41 C2d 587, 262 P2d 305). Specific performance (Civil Code §§ 3384-3395) and termination and retention of amounts paid, when available as remedies are, of course, merely substitutes for money damages.

Section 3300 of the Civil Code provides the measure of damages for the breach of a contractual obligation "* * * is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."²⁵

Civil Code § 3302 provides the "detriment" for the breach of an obligation to pay money is the amount due with interest.²⁵ In the case of the breach of an agreement to buy real property, the

25. Civil Code § 3300:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

Civil Code § 3302:

"The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."

"detriment" referred to in § 3300 is the excess of the amount due under the contract over the value of the property as of the time of the breach (Civil Code §3307).²⁶ If the value of the property has not changed, or has increased, there is no damage to the vendor, except possibly expenses incurred because of the breach (*Royer v. Carter*, 37 C2d 544, 233 P2d 539; *Freedman v. The Rector*, 37 C2d 16, 230 P2d 629).

The general provisions of the Civil Code respecting remedies are set out in §§ 3353 to 3370. The theory of the law in providing a remedy for the breach of a contractual obligation is to give to the non-defaulting party the benefit of his bargain, that is, what he would have received if the contract had been performed. He is not entitled to any more than this, whether the relief sought is termination and retention of amounts paid, specific performance or damages. There is no element of penalty or punishment for breach of contract, and the motive of the defaulting party, whether it be fraudulent, malicious or otherwise is immaterial (*Baumgarten v. Alliance Assurance Co.* (N.D. Cal.) 159 Fed. 275).

Section 3358 of the Civil Code provides:

"Notwithstanding the provisions of this Chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the Articles on Exemplary Damages and Penal Damages, and in Sections 3319, 3339, and 3340."²⁷

Caughlin v. Blair, 41 C2d 587, 262 P2d 305 was an action for damages under a contract for the sale of land. The court said at page 603:

"Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and

26. Civil Code § 3307:

"The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him."

27. None of the exceptions are applicable to this case.

insofar as possible to place him in the same position he would have been in had the promisor performed the contract."

Royer v. Carter, 37 C2d 544, 233 P2d 539, was an action by a vendor to recover expenses incurred. By acquiescence of the vendee, the vendor had repossessed the property and resold it. The expenses here sought to be recovered were in connection with the escrow that had been established. The court held that the purpose of the law in providing a remedy for breach of contract was to give to the non-defaulting party the benefit of his bargain. It was found that the expenses sought to be recovered would have been incurred even if the contract had been performed, and the court therefore, denied recovery to the vendor and said at page 550:

"To do so would place the vendor in a better position than he would have been in had there been no breach."

In *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487, an action for breach of a lease, the court said at page 84:

"It is a fundamental rule of law that courts will not, except where exemplary damages are given, allow a party to a contract, to recover upon its breach more than he would have received by its due performance."

Anything that a vendor receives on the breach of contract by vendee, over and above the "detriment" actually sustained, or beyond the benefit of his bargain, or in addition to what he would have received had the contract been fully performed, is to that extent a penalty and forfeiture against the vendee, and will not be enforced.

Section 3359 of the Civil Code provides as follows:

"Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

Section 3369, subsection 1 provides as follows:

"Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition."

If the vendor has security for the performance of the vendee, he, of course, has remedies to enforce that security. This does not change the basic fundamental rule, however, that in no event is he entitled to any more than he would have received had the contract been fully performed. He is entitled to the "benefit of his bargain", but he is not entitled to more. So if he has taken a mortgage or deed of trust, the interest of the vendee can be foreclosed only by sale. If on the sale, the property brings more than the amount remaining unpaid under the contract, the excess belongs to the vendee.

If the security of the vendor is the retention of title, his rights should be, and are no different. He is still entitled only to the benefit of his bargain. He has available to him the remedy of foreclosure by sale, and if the property is sold for more than the balance remaining unpaid under the contract, the excess belongs to the vendee. In addition, in some circumstances, he has the remedy of strict foreclosure, or foreclosure by judicial decree. The normal procedure for such relief is an action to quiet title, the relief sought by appellants. The form of the relief is to give to vendee a fixed period of time within which to pay, and in default of payment the title of the vendor is quieted and the rights and interests of vendee are foreclosed.²⁸ This is the relief granted by the trial court, and is considered the harshest remedy available against a vendee. It forecloses his interest in the land without right of redemption. If the value of the land exceeds the amount unpaid under the contract, it operates as a forfeiture and penalty, and in such circumstances should not be decreed, but rather there should be a foreclosure by sale, or the vendee is entitled to restitution for the unjust enrichment of the vendor.²⁹

28. See discussion at page 56 below, and following.

29. See discussion at page 66 below.

It would seem clear that under California law, in the absence of an express provision in the contract, the vendor does not have the remedy of terminating the contract, retaining all payments made and regaining possession. He must resort to one of the remedies of foreclosure to enforce the security of his retained title. Even with an express provision in the contract, the remedy is available to the vendor only if it falls within an exception to Civil Code Section 1670, and is in all respects reasonable and bears a reasonable relationship to the actual damage suffered, and does not result in a penalty or forfeiture.

Paragraph 12 of the contract is a provision for liquidated damages. By its terms it provides the "remedy" for the seller in the event of default by purchaser. As the court said in *Freedman v. The Rector*, 37 C2d 16, 230 P2d 629, at page 21, quoting from *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 499, 2 P2d 776,

"A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty."

The provision is void under Civil Code § 1670 unless it falls within the exception of § 1671, and is reasonable as required by Civil Code § 3359.

The provision would fall within the exception of § 1671 only if "* * * * from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."³⁰

A provision for liquidated damages is presumed to be invalid under § 1670, unless it is shown to come within the exception of § 1671 and is reasonable (*McInerney v. Mack*, 34 Cal. App. 153, 166 Pac. 867; *Electrical Prod. Corp. v. Williams*, 117 CA2d Supp. 813, 256 P2d 403). The party seeking to enforce a provision for liquidated damages has the burden of pleading and proving that

30. Civil Code § 1671:

"The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

it falls within the exception and is in all respects reasonable (*Better Food Markets, Inc. v. American District Telegraph Company*, 40 C2d 179, 253 P2d 10; *Atkinson v. Pacific Fire Extinguisher Company*, 40 C2d 192, 253 P2d 18; *Petrovich v. City of Arcadia*, 36 C2d 78, 222 P2d 231; *Rice v. Schmid*, 18 C2d 382, 115 P2d 498; *McCarthy v. Tally*, 46 AC 583, 297 P2d 981). There is no such pleading or proof in this case.

In no circumstances in this case, from the vendor's point of view, would it be "impracticable or extremely difficult to fix the actual damage," resulting from a breach by vendee.³¹

Drew v. Pedlar, 87 Cal. 443, 24 Pac. 749;³²

Knight v. Marks, 183 Cal. 354, 191 Pac. 531;³³

Electrical Prod. Corp. v. Williams, 117 CA2d Supp. 813, 256 P2d 403;³⁴

31. Appellants concede this when they state in their brief at page 27 "We do not agree that Ward's damages would necessarily be difficult to determine." Appellants, at page 27, completely misconstrue the opinion of the trial court. The trial court was not concerned "* * * that conflicting estimates of value might make Ward's damages difficult to determine, * * *", it was rather concerned that conflicting estimates of value might make the amount of restitution to which appellee would be entitled if appellants were to get the property, difficult to determine, that is, the excess of what appellants would so receive over their actual damage. The two questions are entirely distinct.

32. A forfeiture provision in a contract for the sale of land was held to be invalid. The detriment to the vendor in the event of a breach by vendee would be the excess of the amount remaining unpaid under the contract over the value of the land (Civil Code § 3307), and in no circumstance would be impracticable or extremely difficult to fix.

33. A forfeiture provision in a lease was held to be invalid. The obligation of the lessee was to pay money, and the detriment to lessor for a breach of lessee would be the amount due with interest (Civil Code § 3302), and would not be impracticable or extremely difficult to fix. To the same effect is *Ricker v. Rombough*, 120 CA2d Supp. 912, 261 P2d 328.

34. In the case of an instalment contract, the court held that obviously detriment would not be impracticable or extremely difficult to fix, and the maximum would be the amount due under the contract, with interest (Civil Code § 3302).

Baumgarten v. Alliance Assurance Co. (N.D. Cal.), 159 Fed. 275;³⁵

Major-Blakeney Corp. v. Jenkins, 121 CA2d 325, 263 P2d 655 (hearing by Supreme Court denied).³⁶

A provision in a contract for liquidated damages, to be enforceable, must be reasonable and must bear a reasonable relationship to the actual detriment sustained. As the court said in *Freedman v. The Rector*, 37 C2d 16, 230 P2d 629, at page 22:

"A penalty equal to the net benefits conferred by part performance bears no such relationship."

The provision in the case gave to vendor, on the default of vendee, the right to retain all payments made, terminate the contract and regain possession. The court said at page 22:

"* * * its severity increases as the seriousness of the breach decreases."

The more the vendee performs under the contract, the greater is the penalty and forfeiture against him, and under such a provision a vendee who has almost completely performed would suffer the maximum penalty. The court held the provision was invalid under Civil Code § 1670.

McCarthy v. Tally, 46 AC 583, 297 P2d 981, stated that a forfeiture provision under a lease for the mere non-payment of rent would be invalid under Civil Code § 1670. The court pointed out that such a provision, to be enforced, must be a reasonable endeavor to estimate fair compensation for the loss resulting

35. Interpreting the California law, the court held that the damages for mere non-payment of money due under a contract is the amount due plus interest and nothing more (Civil Code § 3302) and a provision for liquidated damages and forfeiture was invalid.

36. A forfeiture provision in a land purchase contract was held to be invalid. On breach by vendee, the vendor is entitled only to the "benefit of his bargain", which would be the excess of the amount remaining unpaid over the value of the land (Civil Code § 3307) and this does not fall within the exception of § 1671.

to a lessor by lessee's breach. A provision for forfeiture of lessee's rights under the lease and to the property for the non-payment of rent bears no proportionate relation to the detriment that may result to a lessor by the lessee's breach.³⁷

The enforcement of paragraph 12 of the contract would work a forfeiture and impose a penalty on appellee. Appellants have established that by their conduct in prosecuting this appeal.³⁸ Appellants have received the full purchase price of \$750,000.00. They have been fully compensated for all costs, expense, loss and detriment suffered as the result of the default in the amount of \$35,514.85. They have received the "full benefit of their bargain", full performance. Anything they receive beyond that would be a penalty and forfeiture. Irrespective of the circumstances or nature of the defaults, they are entitled to no more. But they are not satisfied. They prosecute this appeal because they want more than full performance. They want to retain \$585,859.97 previously paid to them by appellee, they want to regain the land, which by their own testimony is presently worth more than twice the \$164,140.03 remaining unpaid under the contract, and in addition to all of that they want \$96,810.13, for which they levied a writ of attachment in this action. By their own testimony as to the value of the land, they are asking for in excess of \$250,000.00 over and above full performance of the contract.

Appellants argue in their brief that there has been no proof that enforcement of paragraph 12 of the contract would result in a

37. See also: *Better Food Markets, Inc. v. American District Telegraph Company*, 40 C2d 179, 253 P2d 10; *Atkinson v. Pacific Fire Extinguisher Company*, 40 C2d 192, 253 P2d 18; *Rice v. Schmid*, 18 C2d 382, 115 P2d 498; *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 2 P2d 776; *Knight v. Marks*, 183 Cal. 354, 191 Pac. 531; *Nelson v. Dangerfield*, 125 CA2d 146, 269 P2d 953; *Major-Blakeney Corp. v. Jenkins*, 121 CA2d 325, 263 P2d 655.

38. On page 41 of their brief appellants concede that the present value of the property exceeds the amount remaining unpaid under the contract, and state "* * * otherwise, Union would not have sought to have it reinstated." Similarly, otherwise, appellants would not be seeking to forfeit the rights of appellee, and would not have exercised their election under paragraph 12 to cancel the contract.

forfeiture, because there has been no proof of the value of the use of the property while appellee had possession. They cite for this unusual proposition *Bird v. Kenworthy*, 43 C2d 656, 277 P2d 1. The argument is based on a complete misconception of the holding in the *Bird Case*. Appellants, in their statement of the case, fail to point out that prior to the commencement of the action the *buyer* had *rescinded* the contract. Rescission requires that the parties be placed in status quo, that is, in the position they would have been, if the contract had not been made. The buyer in the *Bird Case*, after his rescission, sought to recover all of the money he had paid, without any credit for the value of the use of the property which he had had for over a year. He rescinded, wanted all of his money back, and the use of the property without compensation. It is true in the *Bird Case* the buyer urged as an alternate ground, relief under Civil Code § 3275, but it was in support of, and not an alternative to, his rescission. The buyer did not retract his rescission, or attempt to be relieved of his election to rescind.

Rescission and termination and retention of amounts paid are two totally inconsistent remedies. A rescission is a termination of a contract ab initio, and the parties are to be treated as though the contract had never been made. A termination with retention of amounts paid is a substitute for money damages. Under the latter remedy the non-defaulting party is entitled to no more than he would have received in the event of full performance, the damages are substituted for the performance. The *Bird Case* is in no way opposed to this, in fact the court relies on *Freedman v. The Rector*, 37 C2d 16, 230 P2d 629, and appellants in their brief at page 18, in stating the rule of the *Freedman Case* say:

“* * * he would be penalized in excess of *any damages he caused* (and the vendor would correspondingly be unjustly enriched) if he were denied all relief.” (Emphasis added.)

What damage has appellee caused appellants by these defaults? Rank, attorney for appellants, stipulated on pre-trial conference

that the present value of the land was at least equal to the unpaid balance of the purchase price, \$164,140.03, and stated on the trial "if the property is worth as much as the balance due on the contract, then he has not been damaged by the breach. * * *" (246). If appellants would sustain no damage if they received property of the value of \$164,140.03, obviously they have sustained no damage if they have received cash in that amount. In this action, however, appellants not only seek the land but they also seek a money judgment for \$96,810.13. They seek \$96,810.13 over and above any damage sustained as the result of the breach. Of course the property is worth substantially more than \$164,140.03. By appellants own evidence it had a value in excess of \$300,000.00 (890, 910).³⁹ By appellee's evidence it had a value in excess of \$800,000.00 (575, 578, 725).

Appellee has made very substantial improvements to this property. It has constructed approximately fifty miles of road at a cost of approximately \$400,000.00 (571). This is not disputed. Even Ward, reluctantly, admitted that the roads were excellent (256) and have value (258), but he could not say how much. The timber expert called by appellants, also reluctantly, admitted that the roads have value (900). There is no question the roads have very substantial value, not only for logging operations to be conducted on this land, but also for fire protection and for access to many millions of feet of timber lying beyond this land (572-4, 669-670).

Even on plaintiff's theory that the parties must be put in the position they would have been in had the contract not been made, the record is clear as to the forfeiture. By their cross-complaint appellants allege that the logs removed have a "value" of \$5.00 per M (48). Appellee had paid \$182,503.61 over and above pay-

39. It is interesting to note that Ward, as President of two companies and individually, had for many years owned and controlled many thousands of acres of timber land in Northern California, of which the land here in question was only a small part (930), but he had no idea of the present value of this land (244).

ments on the basis of logs removed at \$5.00 per M. The contract value of the logs was, of course, only \$3.88 per M.⁴⁰ But in any circumstance, appellants by their cross-complaint have alleged the value of the use of the property to be \$5.00 per M for logs removed. Rank recognized this on the conclusion of the trial of the case, when the court asked counsel for their views as to the form of decree that should be entered. Rank stated that the land should be returned to appellants on the payment by appellants to appellee of the difference between what had been paid and \$5.00 per M for all logs removed, otherwise, appellee would be subjected to punitive damages (996-997).

To have terminated the rights of appellee under the contract and in the land would have resulted in the most outrageous forfeiture (*Barkis v. Scott*, 34 C.2d 116, 208 P2d 367).

(B) Paragraph 12, by its Terms, Is Inconsistent and Cannot Be Enforced.

Paragraph 12 of the contract goes far beyond the usual forfeiture provision. It not only provides for the retention of all payments made, the termination of the contract, and regaining possession, but it provides that appellee shall remain liable to appellants for payment of the instalments which are the basis for the forfeiture. It would require appellee to cure the defaults and nevertheless be forfeited out of its contract. They cannot both cancel the contract and enforce it.

Marquardt v. Fisher, 135 Ore. 256, 295 Pac. 499, was an action by a vendor for strict foreclosure. The trial court decreed strict foreclosure and gave a judgment for the amounts in default. This was reversed. The court pointed out that the vendor had a choice of remedies. He may sue for specific performance or he may sue for strict foreclosure. If not inequitable, the court should decree

40. The contract price of \$3.88 was, at the time of the contract, high. The Wilson interests purchased land adjacent to this land, a substantial part of it closer to the public highways than this land, at approximately the same time, for \$3.00 per M (233, 527, 533).

that the vendee pay within a reasonable time, or be foreclosed of his equities in the property. If strict foreclosure is inequitable, that is, if the value of the property exceeds the amount remaining unpaid, then it is the duty of the court, if the money is not paid by the vendee, to order the property sold, and to satisfy the vendor's interest from the proceeds of the sale. In any event, the vendor cannot both foreclose the equities of the vendee and have a judgment for the amounts due. The court said at page 500 of the Pacific report:

"The payment of the money, whether under the compulsion of a judgment or voluntarily made, would operate to reinstate the contract and continue it in force, and thus preserve the vendee's equities under the contract. * * * "

In *Ricker v. Rombough*, 120 CA2d Supp. 912, 261 P2d 328, the lease provided that on default of lessee the lessor could regain possession and recover all rents unpaid to the date of regaining possession. The court held the provision to be invalid.

California Raisin Pool v. Balian, 139 Cal. App. 343, 34 P2d 227, involved a contract for the sale of land, under which it was provided that a part of the proceeds of the crop on the land, to be harvested by vendee, were to be paid to vendor on the purchase price. The contract was thereafter terminated for breach by vendee, and vendor regained possession. In this action vendor sought to recover a part of the proceeds of the crop that had been removed prior to the time of termination. The court denied recovery and said at page 348:

"It is undoubted law that a vendor having elected to forfeit and terminate a vendee's rights, under a contract for the sale and purchase of real estate, cannot thereafter recover the unpaid installments of the purchase price, since by virtue of the termination of the contract these cease to be enforceable obligations. [Citing cases.] So far as Balian's indebtedness represented the purchase price of the land or any interest thereon, it is apparent that after the contract was terminated he was no more obligated to deliver *in futuro* raisins that he had severed from the ground while the con-

tract was in force than he was to make *in futuro* payments that had accrued under it while it was in force. The stipulation for delivery of the raisins amounted merely to a stipulation for making payments in that form."

Glassell v. Coleman, 94 Cal. 260, 29 Pac. 508, involved a contract for the sale of land, under which vendee had given his promissory notes for a part of the purchase price. The contract expressly provided that on default by vendee, the vendor could terminate the contract, regain possession, retain all payments made, and enforce the promissory notes. The court held the notes were unenforceable. The liability of the vendee to pay any part of the purchase price ceased when the vendor terminated the vendee's right to receive the land on payment of the purchase price.

In *Beck v. Shepard Fruit Co., Inc.*, 19 CA2d 590, 66 P2d 188, the contract for the sale of land provided that the proceeds of the fruit crop were to be paid to the vendor on the purchase price. The vendor terminated the contract for a breach by vendee and sought and obtained, by default, a decree quieting his title to the land. He now sues for the proceeds of the crop and for taxes. The court denied recovery. The court stated that on breach by the vendee the vendor had an election either to terminate the contract or to keep the contract alive and recover the payments due, and said at page 598:

"They were not, however, entitled to seek both of these obviously inconsistent remedies, and they were consequently put to their election as to which of the two they would pursue."

To the same effect and holding that, after termination, the vendor could not recover proceeds from the sale of the crop which, by the contract, were to be paid to the vendor on the purchase price, are, *Yakoobian v. Johnson*, 102 Cal. App. 10, 282 Pac. 522, and *Security-First National Bank v. Hauer*, 47 CA2d 302, 117 P2d 952.

In *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283, the trial court entered a decree of strict foreclosure and a judgment for the

amounts which were in default under the contract. This was reversed and the court said at page 607:

"Manifestly defendant cannot properly be required to pay the amount for failure to pay which his rights under the contract are declared forfeited, or, to state it in different words, plaintiff cannot have both a forfeiture and enforcement of the contract at the same time. To sustain such a recovery here would be in effect to require defendant to partially perform his agreement of purchase, and at the same time foreclose all his rights under such agreement."

Portner v. Tanner, 30 Wyo. 85, 216 Pac. 1069, 30 A.L.R. 624, was a case in which the vendee had given the vendor a check in payment of a part of the purchase price. The vendee then repudiated the contract and stopped payment on the check, and the vendor, under the forfeiture provision of the contract, terminated the contract. The vendor now seeks to recover the amount of the check. It was held that he could not. The court said at page 627:

"When the defendant repudiated the agreement made, several courses were open to the plaintiff to pursue, not all of which are necessary to be considered. * * * It was, in any event, open to the plaintiff, on the one hand, to consider the contract as still in force, sue for the breach in its terms or the enforcement thereof, or, on the other hand, to disaffirm the contract, consider it no longer in existence, and sue for the total abandonment or repudiation or breach of it by the defendant, and recover whatever damages he might have sustained. But under the doctrine of election of remedies, plaintiff could not take both of these courses. He could not consider the contract as still in force and at the same time as not in force. He could not affirm it and disaffirm it at the same time; and having once definitely and irrevocably taken one course, that would be binding, and he could not thereafter also pursue a remedy inconsistent therewith."

Plaintiff contended that this was not an action for the purchase money but rather for damages. The court disagreed and said at pages 627-628:

“The case at bar is a suit upon checks which were given as the first payment under the contract. The checks represent part of the unpaid purchase money. A suit thereon, therefore, arises out of or is an incident to one of the covenants of the contract, and necessarily recognizes the contract as still in force and effect.”

By its very terms paragraph 12 of the contract is inconsistent and cannot be enforced. By its terms it provides that the seller shall have the right “to cancel this agreement” and “to recover from the purchaser” all unpaid instalments. If the agreement is cancelled it is cancelled for all purposes. It cannot be cancelled in part and enforced in part. Appellants might as well provide that all provisions of the contract except paragraph 2, providing for payment of the purchase price, be cancelled.

The provision by its terms being inconsistent, it is invalid and cannot be enforced. It cannot be enforced in part and disregarded in part. If it cannot be enforced in toto, it cannot be enforced at all. The provision does not give appellants an alternative. They cannot have both. The provision, therefore, must be disregarded, and appellants can enforce no right or remedy under it. They are remitted to the normal and usual remedies available to a vendor in a case of this kind. By the decree in this case they have received the maximum remedy, and the harshest remedy against vendee, to which they would, in any circumstance, be entitled.

(C) By Asserting Rights Under the Contract After the Notice of Cancellation, and by Obtaining a Writ of Attachment, Appellants Have Made an Election of Remedies and Cannot Now Terminate.

On the breach by appellee, appellants had an election either to disaffirm or affirm the contract. They have affirmed the contract. On May 12, 1954, appellants served on appellee their notice of cancellation. On May 13, 1954, appellants made demand on appellee for the payment of all amounts then in default, including taxes. The demand on May 13, 1954, without more, would constitute a waiver of their right to terminate.

Neet v. Holmes, 25 C2d 447, 154 P2d 854, was an action under a contract for sale of land. The court said at page 459:

"He cannot by words cancel his contract and then continue to assert rights and benefits under it. * * *",

and by so doing it was held that he waived his right to cancel and affirmed the contract, *as a matter of law*.

In *Kern Sunset Oil Co. v. Good Roads Oil Co.*, 214 Cal. 435, 6 P2d 71, the lessor accepted royalty payments under an oil lease after having declared a forfeiture. It was held that by asserting rights under and accepting benefits under the contract, after the notice of forfeiture, he waived his right to forfeit. The lessor argued that the royalty payments were a percentage interest of the oil removed, which were rightfully his whether the lease was in existence or not. The court held that this would not change the universal rule of waiver, because he accepted the royalty payments under the lease and therefore had to affirm the continued existence of the lease. After the notice of cancellation he continued to treat the lease as a subsisting agreement, and therefore waived his right to cancel.⁴¹

The demand by appellants on May 13, 1954, was a demand for payments on the basis of logs removed prior to the termination, and *a demand for the payment of taxes* that had accrued prior to that time. The contract provides that appellee was to pay taxes. The contract nowhere provides that after cancellation appellee shall pay taxes, irrespective of when the taxes accrued. Paragraph 12 does not give appellants the right to recover from appellee taxes after the cancellation of the agreement. The demand for taxes could be only on the basis that the contract was still in existence. It was a clear and unequivocal affirmation of the contract and waived the right to cancel.

The two causes of action of appellants cross complaint, to quiet their title and recover all instalments and taxes due, are, of course, inconsistent. The cause of action to quiet title is based on a can-

41. This case is more fully discussed above at page 30.

cellation and disaffirmance of the contract. The cause of action for instalments due and for taxes, can only be on the basis of an affirmance of the contract. They are not pleaded in the alternative, but appellants ask for both. Under the modern form of pleading it is not improper to set forth inconsistent causes of action in a complaint. The plaintiff is not, however, entitled to relief on both. At some point he must make his election.

Kittle Manufacturing Co. v. Davis, 8 CA2d 504, 47 P2d 1089, was an action on a royalty contract. Plaintiff had previously been in default in the payment of royalties, and defendant sets up those defaults as a defense to this action. But it appeared that defendant had previously sued for and recovered the amount of royalties in default, and it was therefore held that the prior default by plaintiff was not a defense to this action. The court held that if defendant had had the right to terminate the contract for the non-payment of royalties by plaintiff, he had waived that right by suing for the royalty payments. He had made his election. Having enforced performance by plaintiff he could not now rely on the non-performance to excuse his own performance. A court will not compel one party to a contract to perform it and excuse performance by the other. A contract must be enforced against both the parties or it will not be enforced against either. (See also, *House v. Piercy*, 181 Cal. 247, 183 Pac. 807.)

Appellants in this action have made their election. On the filing of the cross-complaint they had issued a writ of attachment for the money damages claimed. The writ was levied on the Bank of America at Arcata, California, and \$21,528.30 of appellee's money was impounded. In addition, the writ was levied on other timber land owned by appellee of a value of approximately \$250,000.00 (707). The attachment was never released.

In *Steiner v. Rouley*, 35 C2d 713, 221 P2d 9, plaintiff pleaded inconsistent causes of action in contract and in tort. Plaintiff obtained a writ of attachment and the court held that this constituted an election of remedies and that plaintiff could therefore proceed only on the contractual remedy. The court said at page 720:

"Concerning the effect of the writ of attachment obtained by the Steiners, the doctrine of election of remedies is based upon the principal of estoppel. 'Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in pursuit of such remedy, whereby he has gained any advantage over the other party, * * * he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right.' " [Citing *DeLaval Pac. Co. v. United C. & D. Co.*, 65 Cal. App. 584, 586, 224 Pac. 766.]

When plaintiff obtained a writ of attachment this was a positive act in pursuit of a contractual remedy, and therefore he had gained an advantage over the defendant and had made an election. Plaintiff was thereafter estopped to pursue any remedy other than that for which he had obtained the writ of attachment.

In *Jones v. Martin*, 41 C2d 23, 256 P2d 905, the court in following the *Steiner Case* said at page 33:

"In *Steiner v. Rowley*, 35 Cal. 2d 713, [221 P.2d 9], the complaint had counts on contract and tort involving the same transaction. Plaintiff attached and it was held that he was estopped to rely upon the action in tort. Similarly, here plaintiff attached the bank account of Wellins indicating reliance upon a contract debt rather than a claim to specific property as the beneficiary of a constructive trust."

To the same effect are *Gedstad v. Ellichman*, 124 CA2d 831, 269 P2d 661 and *Sears Roebuck and Company v. Blade*, 139 ACA 620, 294 P2d 140.

By the issuance of the writ of attachment appellants elected to proceed under the contract, and they cannot now be heard to say that the contract is terminated. By their cross-complaint and writ of attachment plaintiffs sought to recover partial payments due under the contract. By the decree of the trial court in this action plaintiffs have recovered the full purchase price under the contract. They cannot complain of that judgment on this appeal.

EVEN IF THE DEFAULTS WERE WILFUL, THE JUDGMENT WAS PROPER AND WITHIN THE DISCRETION OF THE COURT.

The judgment appealed from did *not* reinstate appellee under the contract. The condition of the judgment was that appellee pay the full unpaid purchase price of \$164,140.03, which was an accelerated payment under the contract, by more than a year, of \$76,410.86.⁴²

The judgment did not grant restitution to appellee.⁴³ The problems of restitution and "unjust enrichment" are not involved on this appeal.⁴⁴

The judgment can be supported by *Freedman v. The Rector*, 37 C2d 16, 230 P2d 629, alone. The *Freedman* Case does *not* hold that the only relief available to a wilfully defaulting vendee is restitution.⁴⁵ The case does hold that relief is not dependent on Civil Code § 3275. In that case the vendee sought specific performance, and in the alternative, restitution of the amounts he had paid. The vendee had repudiated the contract (his default was wilful), and the vendor had resold the property. The court denied specific performance, *not* on the ground that the vendee had repudiated his contract, but rather, specifically, on the ground that the *vendee had not withdrawn his repudiation prior to the resale of the property by the vendor*. The case can only be interpreted to mean

42. Obviously the judgment does not "repeal" Civil Code §§ 1492 and 3275, as stated in appellants' brief at page 30. The judgment is neither contrary to nor dependent upon either of those sections.

43. The interlocutory decree did provide for restitution in the event appellee failed to make the payments required and appellants' title to the land was quieted. It also provided, however, that in such event, further evidence would be taken to determine the amount of unjust enrichment. This alternative provision of the decree did not become effective, because appellee did pay the required amounts.

44. The only question involved in *Bird v. Kenworthy*, 43 C.2d 656, 277 P.2d 1, was one of unjust enrichment after a rescission by the buyer. Proof of "unjust enrichment" is *not* a prerequisite to the relief granted by the judgment, and appellants cite no authority for the statement in their brief, at page 31, that it is.

45. Expressed as the "opinion" of appellants at page 19 of their brief.

that if the contract could have been specifically enforced, it would have been, irrespective of the wilful default. This is in accord with the statement of the court in *Barkis v. Scott*, 34 C2d 116, 208 P2d 367, at page 121:

"A vendee in default who is seeking to keep the contract alive, however, is in a better position to secure relief than one who is seeking to recover back the excess of what he has paid over the amount necessary to give the vendor the benefit of his bargain after performance under the contract has terminated."

The *Freedman* Case cannot be interpreted as restricting the form of relief to be granted. The court granted the only relief possible, restitution.

The judgment in this case is not a form of relief which originated with or is directly dependent upon the line of recent California decisions starting with *Barkis v. Scott*, supra. It is true that these cases, as was pointed out by the Court below, "point the way", and evidence further that the purchaser under a land contract is in a position similar to that of a mortgagor and will be protected from forfeitures and oppressive provisions. The granting to the defaulting purchaser the opportunity to complete his contract by payment of amounts due accords with a practice established in the courts of this state and in other American jurisdictions for practically a century.

The judgment is one of strict foreclosure. This type of decree has been rendered by California courts as a means of terminating the interest of a defaulting purchaser in a contract for the sale of land at least as early as the case of *Sparks v. Hess*, 15 Cal. 186 (1860). The decree of strict foreclosure was approved in *Glock v. Howard, Etc. Co.*, 123 Cal. 1, 10-11, 55 Pac. 713,⁴⁶ the leading

46. The court cited, with approval, *Keller v. Lewis*, 53 Cal. 113 and *Fairchild v. Mullan*, 90 Cal. 190, 27 Pac. 201, in both of which cases the court gave the purchaser a fixed time within which to pay the balance due under the contract, in default of which the vendor's title would be quieted. See below page 58.

case marking "the days when the rights of defaulting vendees were at their lowest ebb in California" (141-142).

The long standing legal basis for the decree of strict foreclosure, as distinct from the recently established authority for restitution to a defaulting vendee, was clearly stated in *Petersen v. Ridenour*, 135 CA2d 720, 287 P2d 848, decided in September, 1955 (after the decree below). The vendor sought to quiet title to residence property being sold under an instalment contract. The contract contained the usual provision making time of the essence and stating that on default the purchaser should forfeit all right to the property and to all money paid under the contract as liquidated damages. Defaults occurred, and the trial court quieted title in the vendor. The judgment was reversed with directions to give the purchaser an opportunity to cure his defaults.

In its opinion the Court went out of its way to show that the relief to which the purchaser was entitled—opportunity to cure his defaults, was not dependent upon the line of cases beginning with *Barkis v. Scott*, and said at page 726:

"It appears that they have had possession of the premises ever since the deal was made in 1948; the rental value is not shown; what the fair value of the property was at time of breach of contract was not proved. Matters such as these are essential to determination of whether there would be unjust enrichment resulting from a judgment quieting title."

The Court went on, however, to hold that these matters were not essential when the purchaser seeks the opportunity to pay the amounts then due, and in such circumstance the claim "does not properly rest upon the *Barkis* line of cases." The Court said, at page 728:

"The averment of an offer to pay any arrearages found to exist invoked another line of applicable cases, having to do with termination of a vendee's rights at the suit of the vendor.

"A quiet title action brought to terminate a contract for sale of realty is essentially a strict foreclosure. (*Warner Bros. Co. v. Freud*, 138 Cal. 651, 654 [72 P. 345]; 27 Cal. L. Rev. p. 584, n. 6). And in 'such case the court finds the amount unpaid, and decrees that it be paid on or before a day stated,

and upon failure to make the payment that defendant's equity be foreclosed' (*Warner Bros.* at p. 654), this because it is 'in consonance with equity.' (*Kornblum v. Arthurs*, 154 Cal. 246, 249 [97 P. 420].) That this is the proper practice is also held in *Keller v. Lewis*, 53 Cal. 113, 118; *Southern Pac. Co. v. Allen*, 112 Cal. 455, 462 [44 P. 796]; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 257 [56 P. 1109]; *Cross v. Mayo*, 167 Cal. 594, 605 [140 P. 283].)"

It will be noted that the purchaser in *Petersen v. Ridenour* was held entitled to reinstate the contract by paying the amount then due; there was no acceleration of future payments. The Court notes, at page 720, "there was no plea of waiver or estoppel", and no issue was raised or discussed as to whether the purchaser's default was wilful. The relief granted depended not on Civil Code § 3275 or *Barkis v. Scott*.

In *Keller v. Lewis*, 53 Cal. 113, a judgment for the vendor quieting title and declaring the payments made forfeited, was reversed with directions to give the purchaser a fixed day within which to pay the balance due, or be foreclosed of his interest in the land. The Court said at page 118:

"It is a *universal rule* in equity never to enforce either a penalty or forfeiture. (2 Story's Eq., 1319, and cases cited.) On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture at law. In the view of a Court of Equity, in cases like the present, the legal title is retained by the vendor as security for the balance of the purchase money, and if the vendor obtains his money and interest he gets all he expected when he entered into the contract. * * * his better remedy, in case of persistent default on the part of the vendee, is to institute proceedings to foreclose the right of the vendee to purchase; the decree usually giving the latter a definite time within which to perform. (*Hansborough v. Peck*, 5 Wallace, 506.)."

In *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283, the Court said at page 605:

"The trial court followed the practice suggested in *Keller v. Lewis*, 53 Cal. 113, and followed in *Kornblum v. Arthurs*,

154 Cal. 246, [97 Pac. 420] and many other cases, of fixing a time within which defendant should pay the amounts due upon said contract, or be foreclosed of all his rights under the contract. As was said in the case last cited 'this was in consonance with equity.' "

The Court in *Kornblum v. Arthurs*, 154 Cal. 246, 97 Pac. 420, said at page 249:

"The court decreed a foreclosure of plaintiff's interest, allowing him, however, ten days in which to preserve his rights to the property upon payment of the moneys provided in his contract. This was in consonance with equity."

In *Odd Fellows' Savings Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109, the trial court ordered that the purchaser "should perform his contract within sixty days or be foreclosed of his rights under the same." The court said at page 257:

"The course pursued in this case was in harmony with the well-settled practice in this state in like cases."

The discretion of a court of equity to make such a decree has never been doubted, and has been repeatedly followed:

Southern Pacific Railroad Co. v. Allen, 112 Cal. 455, 44 Pac. 796;⁴⁷

Gates v. Green, 151 Cal. 65, 90 Pac. 189;⁴⁸

Fairchild v. Mullan, 90 Cal. 190, 27 Pac. 201;⁴⁹

47. The court said at page 462: "The decree gave the defendant the alternative of paying within six months, or suffering foreclosure; and this was in accordance with equity."

48. The court said at page 69: "In such cases, it is settled by our decisions that the judgment should fix a reasonable time within which the vendee may pay the balance due on the contract, before he is forever foreclosed of all right or interest in the lands, or to a conveyance thereof."

49. The judgment gave purchaser 90 days to complete his purchase, and failing that, quieted the vendor's title. The court said at page 194: "Mullan having failed to complete his purchase, the proceeding to foreclose his rights under the contract is strictly in accordance with the practice in equity, and has been expressly sanctioned in this court."

- Wilson v. Beazley*, 186 Cal. 437, 199 Pac. 772;
Stratton v. California Land and Timber Co., 86 Cal. 353,
 24 Pac. 1065;
Sparks v. Hess, 15 Cal. 186;⁵⁰
Veterans' Welfare Board v. Burt, 4 CA2d 659, 41 P2d
 587;⁵¹
Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.
 App. 433, 271 Pac. 363;⁵²
Johnston v. Mulcahy, 4 Cal. App. 547, 88 Pac. 491.

In *Cross v. Mayo*, *supra*, and *Southern Pacific Railroad Co. v. Allen*, *supra*, the amount required to be paid was, as in *Petersen v. Ridenour*, *supra*, less than the entire balance of the purchase price. In most of the cases, it is made clear that the entire balance of the purchase price was due at the time of the decree. In none of the cases was the practice approved or followed of imposing upon the purchaser, under a contract containing no acceleration clause, the requirement of paying the entire balance of the purchase price, including instalments not yet due, in order to save his rights under the contract. The decree rendered by the court below, which required payment of \$76,410.86 not yet due, was in this respect harsher against appellee than the type of decree traditionally approved and rendered in the California courts.

On page 29 of appellants' brief an attempt is made to distinguish some of these cases by the statement that in none of them was time of the essence, nor did the contract provide for cancellation in the event of default by the vendee. These cases can-

50. Stating that the vendor retains legal title as security for the purchase money, and may either sue at law for the balance due, or seek foreclosure by sale or strict foreclosure.

51. Holding that the trial court had discretion whether or not to give the purchaser an opportunity to perform, where vendor had given purchaser 30 days, and purchaser had been in possession for 1 year and had paid only a five percent down payment and one monthly instalment.

52. The court denied mandamus to compel the trial court to foreclose the vendee's interest, where the court had originally granted vendee 30 days to perform, and then granted successive extensions until over one year had elapsed.

not be so distinguished. Four of them⁵³ cite and rely on, *Hansbrough v. Peck*, 72 US [5 Wall.] 497, 18 L ed 520, involving a contract in which time was expressly made of the essence, and the vendor could cancel and retain all payments in case of default by the purchaser.⁵⁴ In *Veterans' Welfare Board v. Burt*, 4 CA2d 659, 41 P2d 587, (1935) the vendor was an agency of the State of California, operating under a State Statute which authorized cancellation and forfeiture in the event of default (See Military and Veterans' Code § 825).

In the strict foreclosure cases it generally does not appear whether time was expressly made of the essence. The reason is clear. A decree of strict foreclosure presupposes a material breach. If the breach were not material, the vendor might have a claim for damages for the delay but could not terminate the contract. The phrase "time is of the essence" means no more than that a breach in the time provision is material. Appellants contend (p. 29 of appellants' brief) that the strict foreclosure cases "were governed by § 1492 of the Civil Code of California which expressly

53. *Keller v. Lewis*, 53 Cal. 113; *Stratton v. California Land and Timber Company*, 86 Cal. 353, 24 Pac. 1065; *Southern Pacific Railroad Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Odd Fellows' Savings Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109.

54. "In case of a default in the payments, there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase money, and take out execution against the property of the defendant, and among other property, the lands sold; or he may bring ejectment, and recover back the possession; but in that case, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase money, together with costs, is entitled to a performance of the contract; or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due, or be forever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase money, and in case of a persistent default, his better remedy, and under some circumstances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The court will usually give him a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement" (72 US [5 Wall.] 507, 18 L ed. 523).

allows an offer of performance to be made after default, where time is not of the essence." These cases are not controlled by § 1492, and do not purport to be. If § 1492 were applicable, there could be *no* foreclosure unless and until a breach *was* "of the essence", i.e., a material breach.

Appellants say (p. 29 of appellants' brief) that in none of these strict foreclosure cases does it appear that the breach was wilful. Conversely it can be said that in none of them is the breach declared to be non-wilful. Wilfulness is simply not an issue, for the opportunity given the purchaser to pay the amounts due under the contract in no way depends on Civil Code § 3275. Some of the cases show on their facts that the breach involved would have been found to be wilful, if that had been an issue. In *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283, the contract provided that the purchaser could sell cattle on the land only upon obtaining the written consent of the vendor and applying the proceeds of sale to the unpaid purchase price. One of the defaults was the sale of cattle without the consent of the vendor and without accounting for any part of the proceeds. Yet, the purchaser was given time in which to pay the amounts due under the contract *to date*, and thus cure the default.

In *Wilson v. Beazley*, 186 Cal. 437, 199 Pac. 772, there was a repudiation by vendee, a wilful breach, and the court decreed strict foreclosure, giving the vendee time within which to pay.

Appellants attempt to distinguish *Nelson v. Dangerfield*, 125 CA2d 146, 269 P2d 953 by stating (p. 25 of appellants' brief) the court permitted a "non-wilfully defaulting vendee" to reinstate the contract or, failing that, to have restitution in the amount of vendor's unjust enrichment. There was no finding and no discussion in the case as to whether or not the default was wilful. The relief granted (which required only the payment of amounts due) simply did not turn on any question of wilfulness.

Appellants state (p. 29 of appellants' brief) that in most of the cases approving decrees of strict foreclosure the appeal was by the

purchaser and not by the vendor. The distinction is not apparent.⁵⁵ In a very early case, *Keller v. Lewis*, 53 Cal. 113 (1878) and in the latest case, *Petersen v. Ridenour*, 135 CA2d 720, 287 P2d 848 (September 1955) the appeals were by purchasers from decrees absolutely quieting title in the vendor, in which the judgments were reversed with directions to give the purchaser the opportunity to make the payments due under the contract.

Appellants (p. 12-14 of appellants' brief) cite three decisions of this court, *Federal Farm Mortgage Corporation v. Davis*, 132 F2d 663; *Starr King School for the Ministry v. Kinne*, 146 F2d 8, (Cert. Den, 325 US 850, 89 L ed 1970); and *Wuchner v. Goggin*, 175 F2d 261. With deference to this Court, we should like to point out that in none of those three opinions was there any reference to any of the California cases cited above, which approve the practice of strict foreclosure. The California law on the point has been particularly clarified and restated in *Petersen v. Ridenour*, 135 CA2d 720, 287 P2d 848, discussed above, pp. 57-58.

These cases of strict foreclosure do no more than give effect to the long recognized rule in California that a vendor under a land sales contract who retains title, has a security interest only. In equity, the vendee is considered to be the owner of the land. The vendor has no greater rights than if he had conveyed the land and taken back a mortgage for the unpaid purchase price.⁵⁶

The rule is expressed in 3 Williston on Contracts (Rev. ed. 1936) § 791, pages 2224-2230, where the learned author says with

55. In all of these cases the action was by the vendor to quiet his title (the relief sought by appellants). In each, judgment was entered quieting vendor's title, conditioned on the failure of vendee to pay (the judgment from which appellants appeal). It is not customary, of course, for a party to appeal from a judgment which grants him the relief for which he prayed. It is apparent that the vendors in these cases were satisfied to receive the "benefit of their bargain", full performance.

56. See, in addition to the above cases: *Kent v. San Francisco Sav. Union*, 130 Cal. 401, 62 Pac. 621; *Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791; *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. 750; *Gessner v. Palmateer*, 89 Cal. 89, 26 Pac. 789; *Baum v. Grigsby*, 21 Cal. 172; *Pickering Lbr. Co. v. Whiteside*, 54 CA 2d 200, 128 P.2d 899; *Estate of Reid*, 26 CA 2d 362, 79 P.2d 451; *Cohn v. Valentine*, 88 Cal. App. 430, 263 Pac. 846.

respect to an executory contract for the sale of land in which the purchaser is in possession, that "the situation should be dealt with in the same way as a mortgage situation is dealt with" (p. 2227).

"Where the transaction is in its essence a mortgage, agreements for forfeiture and provisions that time is of the essence should be given no more weight than similar provisions in a mortgage. * * * In a majority of cases, however, equitable relief has been given a purchaser in possession against provisions making time essential, the situation being rightly treated as substantially the same as that of mortgagor and mortgagee, and the provision for forfeiture as ineffectual as in a mortgage."

Ferguson v. Blood, 152 Fed. 98 (Cir. 9) (1907) was a case arising in the District Court of Idaho, and affirming a judgment of foreclosure by sale with deficiency judgment against the purchaser. On page 103 the Court said:

"Where one contracts to convey real estate to another upon the payment of the agreed price, retaining the title until payment is fully made, it is not very important, in our opinion, what the security so retained is called, whether a trust, a vendor's lien, an equitable mortgage, an equitable security, or any other kind of a lien. Like the Supreme Court of Tennessee:

" 'We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure the payment of a debt. In both cases, courts of chancery consider the estate only as security for the payment of the debt, upon a discharge of which the debtor is entitled to a conveyance in one instance, and a reconveyance in the other.' *Graham v. McCampbell*, 19 Tenn. 52, 33 Am. Dec. 126.

"Where the title is retained by the seller as security for the payment of the debt, the security is, in this country, very generally regarded as possessing all the essential features of a mortgage, and the vendor as standing for all practical purposes as mortgagee in relation to the vendee." (Citing cases.)

The California Legislature has treated the purchaser under an instalment contract for the sale of land as a mortgagor.⁵⁷

In *Estate of Reid*, 26 CA2d 362, 79 P2d 451, numerous California authorities are collected which demonstrate various aspects of the principle that the purchaser is to be treated as the equitable owner, and the vendor as holding the bare legal title merely as security for the purchase price.

In *Weil v. Barthel*, 279 P2d 544, subsequent opinion on rehearing, 45 C2d 835, 291 P2d 30, the California Supreme Court in its first opinion held that a purchaser under an executory contract for the sale of land against whom a court had ordered a foreclosure sale to enforce the vendor's lien for the purchase price, was entitled to a statutory right of redemption pursuant to provisions applicable to sales on execution upon real property. The Court cited cases "emphasiz[ing] the similarity which exists between a transaction in which the vendor retains legal title as security and the ordinary mortgage" (279 P2d 551). The Court then stated that the provision for redemption, now Code of Civil Procedure § 700a, had been construed in early cases as applying to redemption not only from sales on execution but also to sales on foreclosure of a mortgage (prior to the specific provisions now made for redemption from mortgage foreclosure sales).

In the course of the opinion the Court contrasts the remedy of strict foreclosure, characterized by a period fixed by the Court in which the defaulting vendee may pay the amounts due and preserve his rights under the contract, with the remedy of foreclosure by sale. The opinion approves the exercise of discretion by the trial court in ordering a sale to preserve the rights of both the vendor

57. Civil Code § 1662, the Uniform Vendor and Purchaser Risk Act, puts the risk of loss on the purchaser if either the title *or the possession has been transferred* (Paragraph 16 of the contract (22) puts the risk of loss on appellee).

Code of Civil Procedure § 580(b) provides: "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property."

and vendee. In the opinion on rehearing the Supreme Court decided that the question of the purchaser's equity of redemption had been decided adversely to the purchaser in a prior decree in an action between the same parties and that it could not be attacked as incorrect because "an erroneous judgment is as conclusive as a correct one." Nothing was said contrary to the portions of the earlier opinion referred to above, and although that earlier opinion was technically vacated, it remains a useful guide to this court in determining "what the highest court of California would hold if confronted with the controversy now presented to us." *Compania Engraw v. Schenley*, 181 F2d 876, 879 (Circ. 9).

Strict foreclosure is the harshest of remedies. In many circumstances the rights of the vendee should be foreclosed only by judicial sale (as approved in *Weil v. Barthel*, supra).

In *Sheehan v. McKinstry*, 105 Ore. 473, 210 Pac. 167, the Court said that the vendor has, against a defaulting vendee, the remedy of strict foreclosure, a remedy that is "not affected by statute, but is * * * controlled entirely by equitable principles." The court then states at 210 Pac. 171:

"If, however, the vendee has paid a considerable portion of the purchase price, or if the property has largely enhanced in value, or if, for any other reason, it would be inequitable to grant a strict foreclosure, it is within the inherent powers of a court of chancery, independent of statute, to decree that the property be sold by judicial sale and that the proceeds of such sale, after the purchase price and the expenses of such sale have been paid, be paid over to the vendee or to those entitled thereto."

See also *Marquardt v. Fisher*, 135 Ore. 256, 295 Pac. 499.⁵⁸

The authors of the treatise on "Vendor and Purchaser", part 11 in *American Law of Property*, Volume III, make the same point even more strongly (§ 11.75, pp. 190-191):

58. In which the court states, in such circumstance it is the *duty* of the court to order a sale.

See also: 17 Ore. L. Rev. 33 (1938).

" 'Strict foreclosure should only be permitted where no substantial payment has been made, or where the present value of the land is less than the amount due vendor, or where, purchaser having made improvements under the contract, vendor elects to pay for them.' [citing Pound, Progress of the Law, 33 Harv. L. Rev. 833 (1920)] When the situation is not in one of these categories, the court should on application and proof, on the basis either of local statute or general equitable principles, require that the foreclosure be by judicial sale."

The Nebraska court explicitly states in *Swanson v. Madsen*, 145 Neb. 815, 18 NW2d 217, 220:

"We think the rule is that a contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and where such procedure would not offend against justice and equity. Courts of equity will decree a strict foreclosure only under special circumstances where it would be inequitable and unjust to refuse them. Whether or not such a decree will be granted is dependent upon the facts of the particular case being considered and is necessarily addressed to the sound judicial discretion of the court. *Harrington v. Birdsall*, 38 Neb. 176, 56 N.W. 961. But where such a decree is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. *Patterson v. Mikkelsen*, 86 Neb. 512, 125 N.W. 1104."⁵⁹

It is elementary that if the proceeds of a judicial sale for foreclosure of the purchaser's interest brings more than the amount due the vendor plus the costs of sale, the surplus belongs to the purchaser (*Sparks v. Hess*, 15 Cal. 186, 194; *Gouldin v. Buckelew*, 4 Cal. 107).

Indeed, the last cited California case goes even farther. It states that if on default of the purchaser the vendor recovers possession of the property (as distinct from bringing a proceeding for fore-

59. See also: 14 Minn. L. Rev. 342, 359 (1930).

closure in order to quiet his title), the vendor may hold possession only until the rents and profits have paid him the purchase money, and then equity would compel him to convey to the purchaser.

The vendor, like the mortgagee, is entitled to be made whole by being paid the amount he would have received had the contract been performed, but to give him more is inequitable to the vendee, and a forfeiture.

CONCLUSION

Appellants have received the full purchase price for the property. They have been fully compensated for all loss or damage sustained (including attorneys' fees not normally granted).

The court of equity, in its sound discretion, has molded a "just and appropriate equity decree" (138). The judgment must be affirmed.

Dated, San Francisco, California,
July 18, 1956.

Respectfully submitted,

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No. 14,996

In the

United States Court of Appeals

For the Ninth Circuit

HAROLD L. WARD, et al.

Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corporation,

Appellee.

Appellants' Reply Brief

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SEP 10 1956

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SUBJECT INDEX

	Page
Introduction	1
Argument	10
(1) The finding that the defaults were wilful is amply, in fact, over- whelmingly, supported by the evidence.....	10
(2) There was no waiver by Ward of the right to cancel the con- tract	17
(3) The notices of default were sufficient.....	22
(4) Paragraph 12 of the contract is neither invalid nor inconsistent. In any event, it is certainly valid to the extent that Ward can be said to be seeking to enforce it.....	24
(5) No election of remedy was made by Ward as none was avail- able to him. On the contrary, Ward sought the "sole remedy" available to him.....	38
(6) Union was not entitled to the relief which the trial court gave it. The decree was not one of strict foreclosure. In any event, under the law of California, a decree of strict foreclosure can- not be granted in a case in which a time of the essence contract was cancelled by the vendor for a wilful breach by the vendee except if the vendor himself requests such a decree.....	41
Conclusion	49

TABLE OF AUTHORITIES CITED

	Pages
CASES	
Agar v. Winslow, 123 Cal. 587, 590-1, 56 Pac. 422.....	38
Atkinson v. Pacific Fire Extinguisher Company, 40 Cal. 2d 192, P.2d 18	29
Barkis v. Scott, 34 Cal. 2d 116, 208 P.2d 367.....	42, 48
Better Food Markets, Inc. v. American District Telegraph Company, 40 Cal. 2d 179, 253 P.2d 10.....	29
Bird v. Kenworthy, 43 Cal. 2d 656, 277 P.2d 1.....	33, 34, 46
Bird v. Kenworthy, 265 P.2d 943.....	34, 50
Crofoot v. Weger, 109 Cal. App. 2d 839, 241 P.2d 1017.....	1, 49
Cross v. Mayo, 167 Cal. 594, 140 Pac. 283.....	45
Crowell v. City of Riverside, 26 Cal. App. 2d 566, 582, 80 P.2d 120..	28, 42
Dabney v. Key, 57 Cal. App. 762, 765, 207 Pac. 921.....	49
De Hart v. Allen, 49 Cal. App. 2d 639, 122 P.2d 273.....	38
Dickinson v. Electric Corp., 10 Cal. App. 2d 207, 211-12, 51 P.2d 205	38, 39
Drew v. Pedlar, 87 Cal. 443, 24 Pac. 749.....	30
Electrical Prod. Corp. v. Williams, 117 Cal. App. 2d Supp. 813, 256 P.2d 403	31
Freedman v. The Rector, 37 Cal. 2d 16, 230 P.2d 629..	26, 31, 32, 34, 41, 43
German-American Sav. Bank v. Gollmer, 155 Cal. 683, 102 Pac. 932	17
George v. Weston, 26 Cal. App. 2d 256, 263, 79 P.2d 110.....	49
Goold v. Singh, 88 Cal. App. 339, 263 Pac. 548.....	17, 18
Glock v. Howard, 123 Cal. 1, 11-12, Pac. 713.....	24, 43
Hansbrough v. Peck, 72 U.S. 497, 18 L.ed. 520.....	7, 45
Hopkins v. Southern California Teleph. Co., 275 U.S. 393, 72 L.ed 329	48
Jameson v. Chanslor-Canfield M. Oil Co., 176 Cal. 1, 167 Pac. 369....	24

	Pages
Keller v. Lewis, 53 Cal. 113.....	44
Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P.2d 71	17, 18, 39
Knight v. Marks, 183 Cal. 354, 191 Pac. 531.....	30
Landfield v. Cohen, 89 Cal. App. 2d 177, 180, 200 P.2d 149.....	24, 43
Major Blakeney Corp. v. Jenkins, 121 Cal. App. 2d 325, 263 P.2d 655	32, 33
McCarthy v. Tally, 46 A.C. 583, 297 P.2d 981.....	27
Miller & Lux Inc. v. James, 180 Cal. 38, 179 Pac. 174.....	48
Moore v. Heron, 108 Cal. App. 705, 709, 292 Pac. 136.....	49
Neet v. Holmes, 25 Cal. 2d 447, 154 P.2d 854.....	39
Palmer v. McArthur, 99 Cal. App. 510, 514, 278 Pac. 1049.....	49
Pitt v. Mallalieu, 85 Cal. App. 2d 77, 192 P.2d 24.....	43
Petersen v. Ridenour, 135 Cal. App. 2d 720, 287 P.2d 848.....	46
Ricker v. Rombough, 120 Cal. App. 2d Supp. 912, 261 P.2d 328.....	28, 31
Shaw v. Guaranty Liquidating Corp., 67 Cal. App. 2d 660, 663; 155 P.2d 53	28, 42
Steiner v. Rowley, 35 Cal. 2d 713, 221 P.2d 9.....	40
Sturgis v. Gallindo, 59 Cal. 28, 32.....	48
Tuso v. Green, 194 Cal. 574, 581, 229 Pac. 327.....	24
Union Bond and Trust Co. v. Gilbert, 156 Or. 119, 66 P.2d 997.....	8
Veterans' Welfare Board v. Burt, 4 Cal. App. 2d 659, 41 P.2d 587....	45
Weil v. Barthel, 279 P.2d 544.....	47
Wienke v. Rich, 179 Cal. 220, 225, 176 Pac. 42.....	19
Wilson v. Beazley, 186 Cal. 437, 199 Pac. 772.....	46
Wilson v. Security-First Nat. Bank, 84 Cal. App. 2d 427, 432-3, 190 P.2d 975	24

	Pages
STATUTES	
Civil Code of the State of California	
Section 1492	48
Section 1670	24, 29, 30
Section 3275	48
Section 3369	43
Code of Civil Procedure of California	
Section 537	38
Section 537 (2)	40
RULES	
Federal Rules of Civil Procedure, 8 (c)	19
Federal Rules of Civil Procedure, 64	38

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Appellants' Reply Brief

INTRODUCTION

The brief filed on behalf of Union is long; it covers sixty-eight pages to the forty-four pages of our opening brief; it cites one hundred and twelve cases to the sixteen cases cited in our opening brief and raises a number of issues which, to us, did not seem to be involved on this appeal at all.

What, to us, is most significant about that brief, however, is what it leaves untouched and unsaid.

It does not even mention *Crofoot v. Weger*, 109 Cal. App. 2d 839, 241 P.2d 1017, a case which we cited to this court as a "square holding on the subject" (page 22 of our brief) and as the case "closest on its facts to this case" (page 21 of our brief). Since it could not be distinguished from this case, no attempt was made by Union to distinguish it. It was simply ignored.

Nor does Union's brief mention the fact that, unlike the vendor in the usual case of a sale of real property, the vendor in this case had neither the right to sue for the balance of the purchase price nor even the right to sue for damages in the event of a breach by the vendee.

Similarly, little, if anything, is said about the fact that this is an action which *Union* brought; that it was Union which, having admitted its defaults, sought relief from the resulting forfeiture (120, 127) and that it was accordingly incumbent upon Union to show that it was entitled to relief.

Again, no attempt is made (except by the flat assertion that there was a forfeiture) to answer the contention that no forfeiture was proved since there was neither finding nor evidence as to either the value of the use of the land during the eight years that Union was in possession or the value of the more than 90,000,000 feet of timber which it removed.

Finally, nothing is said in the entire brief about the fact that we fully recognize that Union may be entitled to some relief.

Although it is our contention (a contention from which we do not recede and which it discusses very little) that Union came into court with hands so unclean (54 default notices, secreting information from both Ward and the trial court, deliberate perjury by its chief witness) that it should have been denied all equitable relief, we recognize that this court may conclude, as did the trial court, that Union is entitled to relief. To us, therefore, the real question which is raised on this appeal is as to the form which relief shall take if relief is granted for it does not automatically follow that Union is entitled to all of the relief which the trial court gave it if our contention is not well taken that it should be denied all relief.

For all that appears in Union's brief, however, there were only two choices open to the trial court and there are only two choices open to this court: to deny Union all relief and allow Ward to retain the land and the \$585,000.00 which Union paid as well as to recover the value of the logs that were removed but not paid

for or to give Union the relief which the trial court gave it and allow it to complete the contract.

Thus, Union neatly bypasses and leaves unanswered the crucial contention raised in our brief, namely that, even if it is entitled to relief, the only relief which the trial court had the power to give it was relief against Ward's unjust enrichment by way of restitution of part of its payments.

Stripped down to its essentials, Union's position seems to be this:

(1) That the defaults which the trial court found to have been wilful were not wilful.

(2) That Ward waived his right to cancel the contract.

(3) That the default notices did not constitute the "written demand" required by the contract.

(4) That paragraph 12 of the contract is invalid and/or inconsistent and cannot be enforced.

(5) That Ward made an election of remedies which precludes him from terminating the contract.

(6) That, assuming that the defaults were wilful, Union was nevertheless entitled to the relief (by way of strict foreclosure) which the trial court gave it.

Each of the foregoing contentions will be answered in detail later on in this brief. A summary of our position as to those contentions now follows:

(1) The finding that the defaults were wilful is amply, in fact, overwhelmingly, supported by the evidence.

(2) Waiver requires full knowledge of the facts. Ward did not have such knowledge at the time when he assertedly waived his right to cancel the contract.

(3) The notices of default constituted a sufficient "written demand" under the terms of the contract. They were as specific as they could be considering that one of the defaults for which they were given was Union's failure to furnish Ward with the information that Ward would have needed to make them more specific.

(4) Paragraph 12 was neither invalid nor inconsistent at the time when the contract was entered into which is the time when the determination of its validity is to be made. In any event, however, the argument as to its invalidity or inconsistency is of no avail in this case, as Ward is not asking that it be enforced in strict accordance with its terms. Ward seeks no more in this action than the law would allow him if there were no paragraph 12, namely, that his title be quieted subject to his reimbursing Union such part of its payments as would leave him unjustly enriched if he were to retain it.

(5) No election of remedies was made by Ward as none was available to him. On the contrary, Ward sought the "sole remedy" available to him.

(6) Union was not entitled to the relief which the trial court gave it. The decree was not one of strict foreclosure. In any event, under the law of California, a decree of strict foreclosure cannot be granted in a case in which a time of the essence contract was cancelled by the vendor for a wilful breach by the vendee *except if the vendor himself requests such a decree.*

It is apparent that Union seeks to conceal the basic issue upon which this case rests, and upon which it was tried, behind a maze of technical issues, most of which were not even raised at the trial. To us, the one and only issue in this case is whether a wilfully defaulting vendee can be reinstated in his contract and allowed to complete the purchase of the property. That was the issue tried and argued in the court below and that was the issue which that court decided in its opinion and its judgment.

Before we proceed to answer Union's arguments in detail, some comment should be made upon some of the statements contained in Union's "Statement of the Case".

A number of questions are raised at the beginning of Union's brief as to the nature of the contract, the nature of the action, and the nature of the judgment from which this appeal was taken.

We do not believe that it is particularly material to determine

whether the contract was for the sale of land or for the sale of timber. It seems clear, that, if it be called a contract for the sale of land, it should be emphasized that this was neither residential nor ranching nor farming land. This was more like mining or oil producing land. Its value lay in the timber then ready to be logged and the main, if not the only, consideration that entered into the determination by the parties of the contract price was the amount of timber then on the land as disclosed by the French cruise which was available to both Ward and Union (528).

In fact, the very provision which precluded Ward from suing Union for the purchase price made it less of a contract for the sale of land and more of a contract for the sale of timber. In other words, the only obligation which Union actually undertook to perform was the obligation to pay for the timber which it removed. Conversely, the only right which Ward acquired was the right to be paid for the timber which Union removed.

It is true that Union also undertook to make minimum payments but it had it within its power, simply by logging the land, not to have to make any of the minimum payments with the exception of the first one. It is true too that Union had to make a deposit of \$65,000 before it could begin to log so that in effect it had to pay in advance (rather than after their removal) for the last \$65,000.00 worth of logs which it removed from the land. Considering that Union was to be in charge of the logging and that Ward could not effectively control its operations and the waste which might result therefrom, it is not surprising that payment for some of the logs was exacted in advance.

In fact, what happened in this case during the eight years of the contract makes the wisdom of the provision requiring a partial payment in advance quite apparent. On the basis of the cruise upon which both sides relied, there were 152,885,000 feet of redwood and fir on the land located in Township 12* at the time when the contract was entered into (Defendants' Exhibit O).

*One thing may not yet have been made clear in the case. The contract covers land in Township 12 and land in Township 11. The two parcels are

At the time of the trial, there were approximately 37,000,000 feet of salvageable chunks, logs and timber left (724-5). Yet Union had reported or admitted the removal of only 93,000,000 feet (275). In other words, when the case went to trial, approximately 32,000,000 feet of timber were unaccounted for. Because Union reported an amount of fir in excess of that shown by the cruise, the figures as to the waste of redwood are even more impressive. On the basis of the cruise, there were approximately 121,000,000 feet of redwood in Township 12 when the contract was entered into. At the time of the trial, there were approximately 30,000,000 feet of salvageable redwood chunks, logs and timber left (724). Since Union had reported or admitted the removal of only 43,000,000 feet of redwood (Defendants' Exhibit O), approximately 48,000,000 feet of redwood timber were unaccounted for when the case went to trial.

There is no issue of waste in the case at this stage of the proceedings. It is apparent, however, that Union had it within its power to remove and pay for much less timber than would be missing from the land in the event that it ever reverted to Ward. It is to protect Ward against that contingency that Union was required to pay a minimum of \$65,000.00 before it could start logging on the land.

As far as the nature of the action and of the judgment is concerned, there is no room for an argument on terminology. This *is* an action for reinstatement of the contract. This *is* an action which *Union* brought for relief from the cancellation of the

approximately a mile apart and are separated by land owned by Sage Land and Lumber Co. The land in Township 12 has been completely logged by Union or its licensees, the land in Township 11 has not been logged at all. Union was logging in Township 12 at the time of the notice of cancellation and continued logging there until sometime in June of 1954 when the logging operations were completed. Township 11 is accessible only over the Sage lands, hence the attempt by Union in its complaint and at the trial to establish that a right of way over those lands had been created by agreement between Ward and Sage. Although Union is now technically in possession of the lands under this contract, it has done no logging there since June of 1954, the lands in Township 12 having been logged and the lands in Township 11 being inaccessible to it.

contract. Union's amended complaint makes that clear and so does the third paragraph of its brief (page two) where Union frankly admits that, "by its amended complaint", it "sought to be reinstated under the contract".

This is most emphatically not an action brought to *enforce* a forfeiture of Union's rights under the contract. Its rights were terminated on May 12, 1954. All that is involved in this litigation is the question of whether it is entitled to be relieved from the consequences of that termination. This of course includes a determination of whether the cancellation of the contract resulted in a forfeiture.

Finally, we believe that we *are* fully justified in stating that the judgment did reinstate Union under the contract. It was not a judgment of strict foreclosure, as Union would have this court believe, for such a judgment would not have provided, as this judgment did, that, if Union could not or would not pay the balance due under the contract it would be entitled to a refund of the excess of its payments over Ward's damages.

That is a feature which is never found in judgments of strict foreclosure. The very case of *Hansbrough v. Peck*, 72 U.S. 497, 18 L.ed. 520, upon which Union so strongly relies in a later part of its brief, makes it clear that, under the traditional common law rule, a vendee who fails to complete his contract is *not* entitled to a refund of his part payments. It is only under the modern California rule established by the cases cited in our opening brief that a vendee may, under certain circumstances, become entitled to such a refund. When he does become entitled thereto, however, it is by way of relief from the forfeiture which would otherwise occur.

Both the opinion and the findings of the trial judge make it clear that "reinstatement" is what *he* thought that he was giving to Union. Union concedes that the use of the term would be correct if it had been given a year instead of 45 days within which to complete the contract. It appears from the opinion, however, that Union itself argued that the entire purchase price should be paid immediately ("Plaintiff urges that relief can best

be afforded by ordering a conveyance of the land to him upon his immediate payment of the balance of the purchase price * * *'' (139)) *.

In other words, it is apparent that Union did not dare offer to pay less than the entire purchase price as a condition to the reinstatement of the contract. Under the circumstances, Union can hardly complain of our use of the word reinstatement to describe what the trial court did in this case, namely, allow the vendee, after a cancellation of the contract because of his wilful default, to pay the contract price and get the land.

Certainly, it is more accurate to describe the judgment as one of reinstatement than to describe it, as Union does on page 2 of its brief, as a judgment quieting Ward's title to the property.

We do not know whether the fact that the parties were or were not represented by legal counsel during their negotiations for the contract is particularly material at this stage of the proceedings. Since Union seems to consider it material (see page 4 of its brief), it should be pointed out that, although counsel for Union may not have participated in the negotiations, Union did have prominent counsel available at that time (591) and the record certainly does not show that the contract was not submitted to such counsel. At any rate, it is apparent from the entire record that Wilson, Union's president, was at least as experienced in timber matters as Ward or any of the attorneys representing Ward at the time. In other words, it can hardly be contended that Union was taken advantage of in the negotiations for the contract.†

*See also the argument which Louis L. Phelps, Esq., one of the attorneys for Union, made at the end of the trial. It was not printed but is found in volumes 11 and 12 of the typewritten transcript. At page 1013 of volume 11, for example, Mr. Phelps proposed that Union be given a reasonable period of time to pay the entire balance due on the contract. At page 1016 of volume 11, he stated that he would like to sever the parties by paying the entire amount. He argued to the same effect the next day (page 45 of volume 12).

†That Wilson is an experienced and able businessman who does not allow himself to be taken advantage of was made a matter of judicial record approximately 20 years ago by the Supreme Court of Oregon in the case of *Union Bond and Trust Co. v. Gilbert*, 156 Or. 119, 66 P.2d 997.

Union's contention to the contrary notwithstanding, the quantity of logs removed, or reported as having been removed, could affect the purchase price. By wasteful logging or failure to report all logs removed, Union could have depleted the property and turned it back to Ward in its depleted condition while a substantial amount was still owing on the contract.

It is true that, because Union did not start logging in this case as soon as it could have, it paid Ward a substantial sum on account of minimum payments and in excess of the value of the logs which it reportedly removed. When the contract was entered into, however, it certainly was not clear that Union would not start logging as soon as the contract allowed it to. If it had done so, it could easily have impaired Ward's "security" removing logs worth far in excess of the \$65,000.00 which it had deposited with Ward.

Since, under the terms of the contract, payments were not due until the 20th of the month following removal of the logs and a forfeiture could not be declared until 60 days thereafter, Union had a period of at least three and a half months during which it could log as it pleased before Ward had any right to cancel the contract. Thus, if the contract had not provided that Union should pay for all of the logs which it removed, Ward could well have found himself back in possession of land which was worth far less than when the contract was entered into and with no right of action for the difference between the value of the logs removed by Union and the \$65,000.00 deposit which it had made.

Needless to say, it is not only at the beginning of the contract that Union could have logged so extensively and wastefully as to render Ward's "security" meaningless. It could have done so throughout the life of the contract.

We will cover elsewhere (as part of our argument on the issues of wilfulness and waiver) the other contentions that Union makes as part of its statement of the case.

After it had become apparent to Wilson and Owens that Ward was becoming suspicious, Wilson instructed Owens to send to Ward the pink slips covering the logs removed by Union in November and December (345). Under Wilson's instructions (350, 375, 376), Owens also sent a letter to Ward on February 16, 1954, advising him that, although only 11,797 feet had been reported for November and 257,519 for December, the total footage was actually 2,060,425 for November and 2,953,271 for December. (Defendants' Exhibit "S"). This letter was on Coast stationary; although it was the first time that Owens had reported any Union logs to Ward (350), he made no mention of the fact that these were Union and not Coast logs.

Wilson claimed at the trial that it did not occur to him even in February that Owens might similarly have failed to send the slips covering the period of June to October (656). It was too much to expect the court to believe, however, that a businessman in his position would not have asked Owens whether the Union logs for the earlier months had been reported to Ward.

In any event, Owens himself testified that Wilson had instructed him to forward *only* the November and December slips (376).

Much is made by Union in its brief of the fact that French and Harvey knew that Union was logging for its own account. Union accordingly argues that it could not have expected to succeed in concealing that fact from Ward and that, for that reason, its defaults must be held to have been the result of a misunderstanding. The point is, however, that neither Owens nor Wilson knew prior to the cancellation of the contract that information was being supplied to Harvey which could make Ward suspicious (386-8, 693-4).

As bearing on the wilfulness of the defaults, it must also be noted that, under specific instructions from Wilson, Owens refused to allow French to inspect the Union records that were available in Arcata (372). Union argues that its permanent records in fact were in Portland. The question is not, however, whether those records were in Portland or in Arcata. The question is simply

whether information was available in Arcata which could have been given to French and which would have immediately disclosed to him that the Union logs were not being reported to Ward. Such information was available in Arcata. Not only did Owens maintain a stumpage book there showing the quantity of logs removed daily but the Union pink slips were available there too and, as Owens himself testified, it would have been a simple matter to total them up on an adding machine (506).

The conclusion is accordingly inescapable that Union did try to conceal that information from French and Ward as it later did try to conceal it from the trial court.

Brief mention may also be made of the defaults as to taxes. Union again seeks to explain it as a misunderstanding due to the fact that the notice of default covering the 1953-4 taxes was sent on the day that Union paid the 1950-51 and 1952 taxes. What Union fails to mention, however, is the fact that the amounts were different and the further fact that on October 29, 1953 (10 days after Ward gave Union notice of default for the earlier taxes), one of Ward's attorneys sent a letter to Union covering the 1953-4 taxes and enclosing the tax bill (836-7). Union can accordingly hardly argue that it was not aware of the fact that it had two different tax liabilities.

As far as the issue of wilfulness is concerned, the most enlightening testimony is perhaps that of Paul Owens who kept the Coast and Union records in Arcata* and who, as we pointed out in our opening brief, was caught in deliberate perjury at the trial. Although we are confident that this court will wish to read all of his testimony, we will point out some of its high lights here.

On direct examination, Owens testified that the only records which he kept for Union were log haul records, log sales records and contract logger records. He kept no stumpage record (310-311). Early on his cross-examination, he testified again that he kept a stumpage book for Coast but not for Union (323) and that, after the girl in his office made the necessary entries in the three

*He had been employed by or had done work for Union since 1947 (323).

books which he kept, he mailed the white slips to Portland without using them for any other purpose (331). He further testified that he kept no record of cash deposits, cash receipts or anything else in that regard (342), that he had no records from which he could prepare a monthly recap of Union logs (345), that he prepared the letter of February 16, 1954, (Defendants' Exhibit S) from the pink slips as he had no record of the white slips (350), and again that he did not have a Union stumpage book (358-359).

He was then confronted with the photostatic copies of the Union stumpage book (Defendants' Exhibit T). At first, he denied that it had been kept in his office and stated that he could not recognize the writing and did not know who had prepared it (362).

The following day, however, Owens admitted that he kept the Union stumpage book and the Union cash book which he had originally denied keeping (364-370). The cash book was subsequently produced and is now Defendants' Exhibit X. He was excused from bringing the stumpage book as the photostats were in evidence but he testified that the book was exactly similar in form and appearance and was bound in the same way as the four books which were in evidence (361, 491).

Owens' testimony then changed and the true picture began to appear. For example, he had first testified that Wilson had told him to keep the Union pink slips because Union owed no stumpage on the logs as it owned the land. He now admitted that, when he had asked that question of Wilson, he, Owens, was talking about and had in mind the slips for the logs coming off the Ward property (377). Similarly, he had first testified that Wilson had told him to let French see all records (347). He now admitted that Wilson had in fact instructed him to let French see the Coast records but to tell French that the Union records were in Portland (372). Again, although he had previously testified that he did not keep a record of the white slips, he now admitted that he did (374).

Wilson followed Owens to the stand but neither denied nor explained nor commented upon any of his testimony.

Union also seeks to explain its defaults on the ground that it did not have the necessary funds available with which to make the payments to Ward (hence the attempt at the trial to hide the cash book which would have disclosed the true facts). That contention, however, is without any support in the record.

Union received stumpage payments from Coast weekly and currently (334-5, 383-4).

Moreover, Union was paid currently for the logs which it removed and failed to report to Ward (384-5). In fact, the record shows that Union was making a profit of \$20.00 to \$25.00 per thousand feet on the sale of those logs (688-692).

Union's cash book (the existence of which was originally denied by Owens (Defendants' Exhibit X)) shows the funds that were available to Union during the period of its defaults and makes it clear that Union could easily have made the payments had it chosen to. In fact, it shows that, during the period of June to October, 1953, Union diverted approximately \$250,000 of the money obtained from the sale of logs to its Los Angeles and Portland accounts (495). In addition, funds were transferred to other Wilson enterprises (495).

We have no quarrel with the cases which Union cites and which define wilfulness. Assuming that its defaults were the result of an innocent mistake, Union argues that its conduct could not have been found to have been wilful under the definition contained in those cases. We may well agree. If its conduct had been the result of an innocent mistake, it would indeed not have been wilful. If it was as intentional and deliberate as the record shows it to have been, there is no doubt, however, that it comes fully within the definition of those cases and that the finding of the trial court is accordingly fully justified.

On page 19 of its brief, Union argues that the amount of its defaults, although substantial, was small when compared with the value of the property so that it is inconceivable that a businessman in Wilson's position would wilfully have failed to pay them and would thereby have jeopardized his rights under the contract. We

readily concede, as we did at the trial, that we never understood why Union allowed the defaults to occur. This does not mean, however, that they were not intentional.

We also recognize that the argument thus made by Union has a certain strength and appeal. We are confident that it will not impress this court any more than it impressed the trial court but we are nevertheless concerned about how best to answer it. Unfortunately, it compels us either to agree or to go outside the record in order to refute it. After considerable soul searching and being fully aware of the fact that, under normal circumstances, it would be improper for us to do so, we have concluded that we have no choice but to bring to the attention of this court one matter which is outside the record and yet throws considerable light upon Wilson's motivations. On July 20, 1956, Wilson was convicted in the District Court of the United States for the Northern District of California (Judge Goodman presiding) of wilful evasion of the payment of more than \$100,000 in withholding taxes. The case was numbered 34803 in the District Court. It is now on appeal to this court although we understand that the record has not yet been docketed.

We realize that the matter is not final and that the judgment may be reversed. We do not bring it to the attention of this court in order to prejudice it against Wilson although we realize that our action may have that effect. Our purpose is merely to counter Union's argument that, under the circumstances of this case and with so much at stake, Wilson's default simply could not have been wilful.

Apparently, Wilson is the kind of man who likes to take this kind of chance. If he thought that he could "get away" with a failure to pay withholding taxes to the United States, it is not hard to believe that he also thought that he could "get away" with a failure to report and pay for some of the logs which he removed from Ward's land.

(2) There was no waiver by Ward of the right to cancel the contract.

That Union's contention on this issue is not well taken is made clear by the very first paragraph of its argument on the subject (page 26 of its brief). It is there said that the acceptance of any benefit or the assertion of any right under the contract, after a default giving the right to forfeit the contract, will constitute a waiver.

That is not a correct statement of the law. The acceptance of a benefit or the assertion of a right under the contract after such a default will constitute a waiver only if the benefit is accepted or the right asserted *with full knowledge of the right to declare a forfeiture*.

In *Goold v. Singh*, 88 Cal. App. 339, 263 Pac. 548, (one of the very cases relied upon by Union), for example, the Court stated at page 343:

"A waiver, however, being the intentional relinquishment of a known right after knowledge of the facts (citation), the acts alleged to have had that effect must have been done with full knowledge of the right to declare a forfeiture
* * *"

And in *German-American Sav. Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932 (a case in which the Supreme Court of California reversed a judgment based on a finding of waiver unsupported by the evidence), the Court stated at page 691:

"It is not enough that a party might upon inquiry have discovered the fact. There must be actual knowledge of the fact."

None of the many cases cited by Union are to the contrary. Some emphasize the requirement of full knowledge of all the facts. See, for example, the excerpt from *Kern Sunset Oil Co. v. Good Roads Oil Co.*, 214 Cal. 435, 6 P.2d 71, quoted at page 31 of Union's brief. Others do not find it necessary to mention it since there was in fact full knowledge of all the facts.*

*When, for example, under a contract providing for monthly payments of \$100.00, a vendor accepts one or more late payments, there can be no question of his having full knowledge of all the facts. This is a far cry, however, from the situation that was presented in this case.

It certainly is not true that, as contended in the last paragraph of page 32 of Union's brief, the acceptance of a payment under the contract was held, *without more*, to have waived the right to declare a forfeiture in each of the cases which Union cited on page 33 of that brief.

On the contrary, there *was* more than the mere acceptance of a payment in those cases. In each of them, the payment was accepted with full knowledge of all the facts.

We do not concede that, under the particular circumstances of this case and the particular terms of this contract, acceptance by Ward (with full knowledge of all the facts) of payments for some of the logs to which he happened to have title until they were paid for (clause eleven of the contract (20)) would constitute a waiver of his right to cancel the contract on account of Union's failure to report and pay for some other logs which it also removed from the land.

In any event, however, the waiver argument must be rejected on this appeal.

To us, it is clear that Ward did not have the necessary knowledge when he accepted the payments which Union claims that he could not accept and that, if a finding had been made on the subject, it could only have been favorable to him. The trial judge, however, made no finding on the subject. We can only conclude that he did not feel that Union was entitled to relief on that basis.

Be that as it may, however, at this stage of the proceedings, we are not concerned with the question of whether a finding of waiver would have been supported by the evidence.* As far as this court is concerned, the judgment can be upheld on the theory of waiver only if the evidence was such as to compel a finding that Ward waived the right to cancel the contract.

Since, to say the least, the evidence was in conflict on the sub-

*The question of waiver is a question of fact (*Goold v. Singh*, *supra*, at 343).

ject, such a finding could in any event not be made now as a matter of law.*

Concededly, at the end of January of 1954, Ward knew that something might be wrong. That is why he started the investigation which eventually led to the discovery that something in fact was wrong, namely, that Wilson was neither reporting nor paying for some of the logs which he was removing from the land.

This was not a case in which the vendee was required to make fixed payments at fixed times and in which the vendor would accordingly know at all times whether the vendee was current or not. This was a case in which the vendee was required to report the varying amounts of logs which he removed each month and in which he was required to make payments only to the extent that he had removed logs from the land. Hence, the vendor could not know whether the vendee was current unless the vendee told him or unless the vendor himself took the time to investigate.

In this connection, it must be emphasized that Ward lived in Michigan, not in California.

Union argues at length that, because he employed French and Harvey, Ward must be held to have known currently the amount of logs which were actually being removed from the land.

The testimony is clear, however, that he did not. Neither French nor Harvey were employed for the purpose of checking the amount of logs removed by Union. They were employed to make sure that the logs were properly branded as between their respective owners, to limit waste in the logging operations and to enable Ward to determine how many logs Union actually recovered from a given location as compared with the amount of logs which, according to the cruise, could be recovered from that location (193-4, 203-4).

The Harvey reports themselves make it clear that they were not intended as a check on Union's reporting honesty. They classified the logs on the basis of the landings from which they were

*It may incidentally be noted that both the California practice and the Federal Rules of Civil Procedure require that waiver be affirmatively pleaded (See *Wienke v. Rich*, 179 Cal. 220, 225, 176 Pac. 42; Rule 8(c) FRCP). It was not pleaded by Union.

removed as logs removed from the Ward lands (landings from which only Ward logs were being removed), logs removed from the Sage lands (landings from which only Sage logs were being removed), and logs removed from both the Ward and Sage lands (landings from which both Ward and Sage logs were being removed) (198-9, 212). Because of the Ward and Sage classification, the reports were thus the clumsiest device with which to attempt to ascertain the number of logs that were actually removed from the Ward lands (or, for that matter, from the Sage lands) and it is clear therefore that they were not prepared for that purpose.

Moreover, the question is not whether the necessary information as to Union's defaults could have been obtained from the Harvey reports. It is rather whether that information was in fact obtained from them. Ward testified that, because the reports did not provide him with the information in which he was primarily interested, he stopped looking at them (201-2, 208). His testimony on the subject certainly cannot now be disregarded as it would have to be if this court were to conclude that there was a waiver.

It must also be noted that the fact that there was a discrepancy between the Harvey and the Union reports did not necessarily mean that the Union reports were incorrect. It could mean that the Harvey reports were incorrect, a possibility which, needless to say, it was necessary to investigate.*

*We do not consider the following facts to be particularly material but it should perhaps be noted, since Union attaches importance to the fact that French and Harvey may have known how many logs were being removed by Union, that neither knew how many logs were being reported (298, 409).

It should perhaps also be made clear that Ward did not start to check on Union's activities until the end of 1952 when French and Harvey were employed. The implication which is sought to be conveyed by Union's brief to the effect that Ward started policing the land in 1946 is not supported by the record. It is true that, at page 973, Ward testified that, since May 1, 1946, he had employed various persons to check the operations in the woods, etc. That testimony was given in connection with his expenses under the contract and was obviously intended to separate expenses incurred before the contract was entered into from those incurred thereafter. In fact, however, there was no investigation and no expense was incurred prior to the employment of French and Harvey.

The last notice of default under the contract was given by Ward on April 21, 1954 (Defendants' Exhibit AB printed in the Appendix to our opening brief). The record certainly does not require a finding that Ward had full knowledge of all the facts as of that time. Hence, no waiver resulted from the giving of that notice or from the acceptance of earlier payments made by Union (the last one was made on March 27, 1954 (Defendants' Exhibit I printed in the Appendix to our opening brief)).

In fact, the record compels the conclusion that Ward did not obtain full knowledge of all the facts until the early part of May of 1954 (265, 275, 957-8).

In the footnote to page 33 of its brief, Union also cites a number of cases in support of the proposition that the right to declare a forfeiture is waived by a failure to act promptly. Again, we have no quarrel with those cases. In this case, however, there most obviously was no failure to act promptly.

Finally, Union argues that it was entitled to assume that Ward would bring the defaults to its attention if and when he discovered them since, on previous occasions, he had brought errors in multiplication to its attention (270-1).

This, however, was not a mere error in multiplication discoverable and discovered by comparing the reports with the payments sent by Union and multiplying the reported footage of logs removed by \$5.00. This was a wilful attempt to avoid paying for some of the logs by not reporting that they had been removed. Although it may be true that, on the issue of waiver, it makes no difference whether a default was or was not wilful, it would seem that Union can hardly rely in this case on the argument that, on a few previous occasions, Ward had brought discrepancies between the payments and the reports to its attention.

What Union is actually trying to have this court hold is that, instead of giving it a period of grace of sixty days, the contract gave it such period of grace as it could "get away" with. In other words, Union seemingly contends that, after receiving a notice of default for its complete failure to report and pay for the logs

which it removed during the previous month, it could cure that default by making a partial report and payment and it could then wait until such time as Ward discovered that the report and payment were only partial and gave it a further notice of default and another sixty day period of grace. In fact, carried to its logical conclusion, this would not even have to stop after the second notice of default. A further partial report and partial payment could further delay full compliance with the terms of the contract.

It is clear that such was not the intent of the contract. Union was to report and pay for the logs which it removed by the 20th of the month following their removal. It failed to report or pay for the logs which it removed during the period of June through October of 1953, and, in due course, it received a notice of default to that effect.

Thereafter, it was up to Union to see to it that the defaults were cured and the reports and payments made.

(3) The notices of default were sufficient.

Union next argues that Ward did not comply with the condition of the contract which would have enabled him to declare a forfeiture since he made no written "demand" for performance by Union.

This is another issue which was not raised in the pleadings, on which the trial court made no finding* and as to which Union can prevail on this appeal only in the event that the record is found by this court to compel the conclusion that the notices of default were insufficient as a matter of law. In our opinion, the record compels the conclusion that they were amply sufficient.

All 54 notices given by Ward were in the same form (defendants' Exhibit H). The notices given for the months of June through October of 1953 specified that Union was in default in three particulars: (1) failure to report, (2) failure to send scale slips and (3) failure to pay (90-98). Each notice also specifically

*It is not clear to us that the issue can even be said to have been raised at the trial.

called Union's attention to the time of the essence and cancellation clauses of the contract (clauses 19 and 12 (23 and 21)).

Union would have this court hold that the notices were faulty because they did not specify the amount due.

It is our position that the contract cannot be construed to impose such a requirement upon Ward. It could not require Ward to tell Union how much Union owed Ward since it contemplated that Union would know and Ward would not (or at least not necessarily) know how much that was and further contemplated that the necessary information on the subject would be furnished to Ward by Union. If Union's contention were sound, it could altogether have prevented Ward from declaring a forfeiture simply by keeping the necessary information from him.

On August, 1953, for example, when he gave notice to Union of its default in reporting and paying for the logs removed in July of 1953, Ward was in no position to be more specific than he was. Union did not furnish him with the information which would have enabled him to be specific as to the amount due for those logs until late in October of 1953 (278).

It should incidentally be noted that Union itself always acted on the assumption that the notices were sufficient. We realize that the fact that it always acted on that assumption would not necessarily make an insufficient notice sufficient. Our contention is merely that the notices were in fact sufficient and that Union recognized them as such.

It is also argued by Union that the notices did not even demand any performance on its part. It is true that they did not use the word "demand". With all due respect, however, we must ask what other purpose they could have had except that of demanding that Union perform its obligations under the contract. And that is the purpose which Union understood them to have.

We have no quarrel with the cases cited by Union in support of the proposition that there must be strict compliance with the conditions of a contract which are prerequisites to the declaration of a forfeiture. There was such a compliance in this case.

Jameson v. Chanslor-Canfield M. Oil Co., 176 Cal. 1, 167 Pac. 369, upon which Union primarily relies, is altogether distinguishable. That case did not deal with the sufficiency of the form of the notice but with the question of who were the parties who should give it. The notice in that case was given by two of three lessors. The court held that the lease required that all three lessors join in giving it and in declaring the resulting forfeiture.

None of the other cases cited by Union are in point. None involved the question of the sufficiency of a notice of default as a prerequisite to the cancellation of a contract. They accordingly can be of no assistance to this court in determining whether the 54 notices of default given by Ward to Union were sufficient demands for performance.

(4) Paragraph 12 of the contract is neither invalid nor inconsistent. In any event, it is certainly valid to the extent that Ward can be said to be seeking to enforce it.

Union contends that, under Section 1670 of the Civil Code, paragraph 12 of the contract is invalid.

It is our position that it is not invalid. Assuming, however, for the purpose of argument, that that part of paragraph 12 which provides for the retention of the amounts paid by Union would, under the circumstances existing at the time of the breach, be considered an invalid provision for liquidated damages, the fact remains that the judgment must nevertheless be reversed. This is for the simple reason that Ward is not seeking to enforce paragraph 12 in accordance with its terms. He seeks only to retain so much of the moneys paid and to be paid by Union as will not result in his unjust enrichment. In other words, he seeks only what the law would allow him in any event upon the cancellation of the contract.

Glock v. Howard, 123 Cal. 1, 11-12, 55 Pac. 713;

Tuso v. Green, 194 Cal. 574, 581, 229 Pac. 327;

Wilson v. Security-First Nat. Bank, 84 Cal. App. 2d 427, 432-3, 190 P.2d 975 (hearing denied).

Landfield v. Cohen, 89 Cal. App. 2d 177, 180, 200 P.2d 149 (hearing denied).

It is true that, in recent years, the Supreme Court of California has held that the defaulting vendee may be entitled to certain forms of relief to which he was not originally entitled. This has no bearing, however, on the question of whether the vendor has to rely on the contract to obtain the relief to which he is entitled.

Union begins with a comprehensive review of the remedies available in the event of a breach of contract in the course of which it advances the following propositions:

(1) That rescission and the recovery of damages are inconsistent remedies.

(2) That the remedy of damages is intended to give the non-defaulting party the benefit of his bargain and no more.

(3) That the remedy of termination of the contract and retention of the amounts paid is merely a substitute for the remedy of damages.

(4) That, being a substitute for the remedy of damages, the remedy of termination of the contract and retention of the amounts paid is inconsistent with the remedy of rescission and entitles the non-defaulting party to no more than the benefit of his bargain.

(5) That, in this case, Ward chose the remedy of termination of the contract and retention of the amounts paid rather than the inconsistent remedy of rescission and that he is accordingly entitled to no more than what he would have received had the contract been performed, namely, \$750,000.00 plus such damages as the trial court awarded him.*

The question may well be asked as to why it was so important for Union to disassociate the remedy which the contract gave Ward from the remedy of rescission. The answer is of course that a party who rescinds a contract, unlike a party who seeks damages, may legitimately end up with more than he would have received if the contract had been performed.

*It might be well to note that, since Wilson was not bound to complete the contract, the benefit of Ward's bargain was not to receive \$750,000. It was rather to have the contract performed according to its terms *or* to get the land back in such condition as it might be.

To be specific, a vendor who sells a house for \$10,000.00 and who thereafter becomes entitled to and does rescind the contract, will get his house back (upon refunding to the vendee whatever payment the vendee made) even though the house may then be worth \$20,000.00. And the vendee is not allowed to complain in such a case that the vendor is getting more than he would have received if the contract had been performed.

No case need actually be cited in support of the foregoing proposition but it may be well nevertheless to refer to *Freedman v. The Rector*, 37 Cal. 2d 16, 230 P.2d 629, because that case exemplifies both what the vendee is and what he is not entitled to. As the court will recall, the vendee was given some relief in that case. He was given no part, however, of the increased value which the house had acquired between the time when the contract was entered into and the time when it was rescinded.

When the contract was entered into, the property was worth \$18,000.00 of which the vendee paid \$2,000.00 to the vendor. When the contract was rescinded, the property was worth \$20,000.00. In the action that followed, the court held (for reasons which were discussed in our opening brief) that the vendor should refund to the vendee part of the \$2,000.00 which the vendee had paid. The vendee was not allowed, however, to share in the increased value of the property (which is what Union claims to be entitled to do in this case).

Yet, it cannot be denied that the vendor did get more than he would have received had the contract been performed.

Thus, as is made clear by the long established rules pertaining to rescission as well as by the recently established rule announced in *Freedman v. The Rector*, supra, the protection to which the vendee is entitled in a case in which, as a result of the termination of the contract, the vendor retakes possession of the property is a protection against a loss and the imposition of a penalty. He is entitled to no more.

It is immediately apparent, however, that there is a great analogy between the objective which the courts seek to achieve in

cases in which the vendor claims damages and the objective which they seek to achieve in cases in which the vendor retakes possession of the property. Even though, in damage cases, the courts speak of not giving the vendor more than he would have received had the contract been performed, they are actually concerned only with protecting the vendee against a loss or a penalty. The courts are most definitely not concerned (just as they are not concerned in rescission or termination cases) with how much the vendee would have made had the contract been performed.

Applying the foregoing principles to the facts of this case, it is clear that the only question with which the trial court should have concerned itself was whether the termination of the contract would inflict a penalty upon Union. If it did penalize Union, however, it would be because it had received less than \$585,000.00 worth of logs, not because the value of the land had doubled or quadrupled.

We now come to a closer analysis of the various contentions made by Union in part III of its brief.

We have no quarrel with the cases which Union cites on pages 38 and 39 of its brief. We recognize that a vendor who seeks damages is not entitled to recover, upon the breach of a contract, more than he would have received by the due performance of the contract. This, however, (and let it not be forgotten although Union never mentions the fact in its brief) is a case in which the contract denied the vendor the right to sue the vendee for damages.

And this is a case too in which the vendor was given the right of cancellation in the event of a default by the vendee. It is significant that, of all the cases which Union cites, not a single one holds that a provision for cancellation of the contract in the event of a default is invalid.* We readily concede that, in a given case,

*Although Union seems to imply that it does (p. 43 of its brief), *McCarthy v. Tally*, 46 A.C. 583, 297 P.2d 981, does not hold that a cancellation provision is invalid. On the contrary, the court held that, on retrial, a provision for liquidated damages in the amount of \$10,000 might be found valid. The court further held that no showing of actual damages need be made if the provision is otherwise valid.

the vendee may be entitled to relief including, if his default is not wilful, relief by way of reinstatement of the contract. At this point, however, we are merely dealing with Union's broad contention that the provision for cancellation of the contract, freely entered into by the parties, must automatically be disregarded. Such a contention is altogether unsound.

At page 40 of the brief, reference is made to the action to quiet title which Ward brought by way of cross-complaint as being "the relief" sought by Ward. It is our position that Ward did not seek any relief and particularly that he did not seek to have a judicial termination of the contract. The contract was terminated by its own terms and Ward merely asked the court to declare that it had thus been terminated.

Crowell v. City of Riverside, 26 Cal. App. 2d 566, 582, 80 P.2d 120;

Shaw v. Guaranty Liquidating Corp., 67 Cal. App. 2d 660, 663; 155 P.2d 53 (hearing denied).

At the bottom of page 40 of its brief, Union states that, if the value of the land exceeds the amount remaining to be paid on the contract, a decree quieting the vendor's title operates as a forfeiture and penalty. As we have already indicated, however, it operates as a forfeiture and penalty, if it does operate as such at all, not because the value of the land exceeds the amount unpaid on the contract but because the amount which was paid exceeds the value of the performance which the vendee received thereunder.

The fact that the value of the land exceeds the balance remaining due on the contract is completely immaterial and so is the fact that the property increased in value. Their only significance is that, at first glance, it may seem unfair to deprive the vendee of property worth more than the balance remaining due on the contract.

In this case, however, when it is remembered that it is not only the value of standing timber that skyrocketed during the last ten years, but also the value of the logs which Union removed from the land, it may be that much, if not all, of the apparent unfairness disappears. Although the record does not show how

much Union received for the logs which it removed between 1950 and 1954, it is not difficult to assume, in view of the apparent increase in the value of standing timber, that Union received considerably more for the logs than the \$585,000.00 which it paid to Ward. The record does show that Union made a profit of \$20 to \$25 per thousand feet on the sale of the logs (690-692).

At page 41 of its brief, Union argues that paragraph 12 is in effect a provision for punitive damages which must be held to be void under Section 1670 of the Civil Code.

In our opinion, however, paragraph 12 can be sustained in its entirety as a valid provision for liquidated damages.

It is settled by the very line of cases which Union cites (see, for example, *Better Food Markets, Inc. v. American District Telegraph Company*, 40 Cal. 2d 179, 253 P.2d 10; *Atkinson v. Pacific Fire Extinguisher Company*, 40 Cal. 2d 192, 253 P.2d 18) that the determination of the impracticability or difficulty of fixing actual damages is to be made as of the time when the contract was entered into and that the fact that damages are readily ascertainable when the breach occurs makes no difference.

It would have been extremely difficult and impracticable when the contract was entered into in this case to fix the damages which might be incurred by Ward in the event of certain breaches of the contract by Union. This was not merely a contract under which Union agreed to pay for the logs which it removed. It was also a contract under which Union agreed to log the land in a certain way (clause 9(16-19)). It is apparent that it would have been extremely impracticable and difficult to fix the actual damages for a breach of the logging provisions of the contract. The same would be true in the event of waste committed by Union. Hence, paragraph 12 was valid in its entirety.*

*This Court will note that, in connection with its argument on this point, Union states that the party seeking to enforce a provision for liquidated damages has the burden of pleading and proving its validity and further argues that there is no such pleading or proof in this case (See pages 41 and 42 of Union's brief). As will hereinafter appear, however, the burden of proof in this case was on Union and not on Ward.

In any event, Section 1670 avoids a contract only *to the extent* that it provides for a penalty or punitive damages.

It is accordingly essential that we ascertain to what extent, if at all, compliance with paragraph 12 of the contract could result in a penalty or punitive damages.

It is clear that neither the cancellation of the contract and the repossession of the land by Ward nor the requirement that Union pay for all the logs which it removed could result in a penalty or forfeiture. It is only to the extent that the total payments made by Union might exceed the value of those logs that a penalty or forfeiture might conceivably result. It is accordingly only to that extent that paragraph 12 may be unenforceable.

In other words, if any part of paragraph 12 is unenforceable it is that part which allows Ward to retain the portion of the \$585,000.00 which Union paid in excess of the value of the logs which it removed. That is the only possible penalty which may result from its enforcement. Ward, however, seeks to retain only so much of the \$585,000 as will not result in a penalty.

We have no quarrel with the cases which Union cites on pages 42 and 43 of its brief. All are distinguishable since, in none of them, were damages difficult to ascertain.

Knight v. Marks, 183 Cal. 354, 191 Pac. 531, for example, was an action for rent in which the court held that the lessor could recover no more than the actual amount of unpaid rent and rejected his contention that he was also entitled to a deposit which the lessee had left with him as security.

In *Drew v. Pedlar*, 87 Cal. 443, 24 Pac. 749, a case in which the contract had been rescinded by the parties before the filing of the action, the vendee sought a refund of his down payment as against the vendor's contention that he could retain it as liquidated damages. The court pointed out that the vendor would certainly be entitled to recover such actual damages as he had sustained (he apparently sustained none as the property had greatly increased in value and was not asking for any actual damages). The court held, however, that the provision for the

retention of the down payment was in effect a penalty and accordingly gave judgment for the vendee.

The case is thus similar to *Freedman v. The Rector*, supra. It denies to the vendor the right to retain the payments made by the vendee to the extent that those payments exceed the vendor's damages and gives the vendee the relief to which we recognize that Union may be entitled.

In *Ricker v. Rombough*, 120 Cal. App. 2d Supp. 912, 261 P.2d 328, the lessor sued the lessee (who had vacated the premises before the expiration of the lease) for the entire balance of the rent under a provision of the lease which allowed the rent to be accelerated. The court held that the acceleration clause in effect provided for a penalty and refused to enforce it.*

By way of dictum, the court stated that the acceleration clause was rendered more difficult to uphold by the fact that the lease provided that the lessor could both terminate it and sue for all of the unpaid rent. This is altogether distinguishable from our case in which the contract denied Ward the right to recover the balance of the purchase price.

Moreover, even if the contract in this case were deemed to give Ward the equivalent of future payments (to the extent that the payments which Union made in the past were in excess of the value of the logs which it removed), it does not follow, although Union claims that it does, that the judgment should accordingly be affirmed. On the contrary, the cases relied upon by Union make it clear that the only effect of the rule against punitive damages should be to make the provision for retention of the payments invalid to the extent that they exceed the value of the logs removed.

We do not want to be belaboring the point but we must again emphasize that we fully recognized the possible applicability of that rule in our opening brief and continue to recognize it now.

*The case of *Electrical Prod. Corp. v. Williams*, 117 Cal. App. 2d Supp. 813, 256 P.2d 403 is similar to *Ricker v. Rombough*, supra. It too involved a lease and an attempt by the lessor to enforce a provision for stipulated damages amounting to 75% of the rental for the unexpired term.

The best answer to Union's contention, however, is found in *Major Blakeney Corp. v. Jenkins*, 121 Cal. App. 2d 325, 263 P.2d 655 (hearing denied), one of the very cases upon which Union relies.

The action arose out of an escrow for the purchase of real property under the terms of which the vendee had made a deposit of \$1,500.00 which the vendor was authorized to retain as liquidated damages in the event of a breach by the vendee. The vendee failed to pay the balance of the purchase price within the time specified by the contract. Having made a later tender, which the vendor refused to accept, the vendee filed an action for declaratory relief seeking a determination of the rights and duties of the parties under the terms of the contract.

The trial court quieted the vendor's title and refused to allow the vendee a refund of any part of his down payment. On appeal, the court held that the provision for the retention of the down payment by the vendor was invalid.

On the authority of *Freedman v. The Rector*, supra, it reversed the judgment to enable the vendee to make such showing as it was able to make to justify a refund of at least part of its down payment.

To that extent, the case does stand for the proposition for which it is cited in Union's brief, a proposition with which, as we have already indicated, we have no quarrel at all. What is significant about the *Major-Blakeney* case, however, as far as the determination of this case is concerned, is the fact that the court also held that, time being of the essence, the vendor had "justifiably terminated" (121 Cal. App. 2d at 331) the vendee's rights under the contract upon the vendee's default.* That is of course all that we contend for in this case.

The *Major-Blakeney* case also provides a complete answer to another of Union's contentions. The court held that the defaulting vendee had the burden of proof on the issue of the vendor's

*On the following page (332), the court stated that "the contract was no longer in force".

right to retain the down payment and that the vendor could retain it unless the vendee made a sufficient showing of unjust enrichment. In other words, Union's contention to the contrary notwithstanding, in a case such as this, the burden is not upon the vendor to show that the clause for liquidated damages is proper. The burden is on the vendee to show that it would be improper for the vendor to retain the payments made by the vendee.

Thus, far from supporting Union's contention that the judgment must be affirmed, the *Major-Blakeney* case supports our contention that, even though the provision for retention of the payments may be unenforceable to some extent, the provision for termination of the contract remains valid. The only issue with which the court can legitimately concern itself is therefore that of the relief to which the vendee may be entitled against the unjust enrichment of the vendor.

It should be noted that a hearing was unanimously denied by the Supreme Court in the *Major-Blakeney* case.

At page 45 of its brief, Union describes as unusual our contention that there was no proof in this case that the enforcement of paragraph 12 would result in a forfeiture since there was no proof of the value of the use of the property while it was in possession.

With all due respect, we stand on our "unusual" contention and we further submit that *Bird v. Kenworthy*, 43 Cal. 2d 656, 277 P.2d 1, fully supports it. Far from our having completely misconceived the holding of that case, we believe that the misconception is that of Union.

Union fails to mention the fact that the rescission by the buyer (which it regards as so significant) took place after he had tendered the entire balance due under the contract and the further fact that he sought a recovery in the alternative: either all of the money which he had paid or at least as much of that money as the court would give him *by way of relief from the forfeiture*.

The *Bird* case cannot be distinguished from this case on the ground that it involved a rescission by the buyer whereas this case does not. Let us suppose that the buyer had defaulted in his payments and the seller had repossessed the property (as happened in the *Bird* case). Let us suppose further that, without "rescinding" the contract, the buyer had then sued for a "relief from forfeiture" refund of all or part of his payments. That would have been the situation presented in *Freedman v. The Rector*, supra, and, under the rule of that case, the buyer should have been entitled to relief from the forfeiture *if, in fact, there was a forfeiture*.

Does Union contend that, in such a case, the buyer *would* have been entitled to the relief which the court denied him in *Bird v. Kenworthy*? Does Union mean to say that, in such a case, the buyer would have been allowed to argue that the seller was only entitled to the "benefit of his bargain"?

It is clear that, as far as the issue of relief from forfeiture was concerned, the question of whether the buyer had rescinded or not seemed completely immaterial to the Supreme Court of California. It is clear too that, as far as the question of whether there was a forfeiture in the first place is concerned, the fact that the buyer rescinded (which merely means that he chose not to proceed with his contract and notified the seller accordingly) is similarly completely immaterial.

As we did in our opening brief, we again urge this court to read the opinion of the District Court of Appeal in *Bird v. Kenworthy*. 265 P.2d 943, (another case which Union fails to mention in its brief). The court held that there could be no clearer case of forfeiture than that of a vendee deprived of property worth \$28,000.00 at a time when only \$5,000.00 remained to be paid under the contract.

Yet, that is the very decision which the Supreme Court of California would not allow to stand and, when it took the case over, it held that the vendee was not entitled to any relief since, in fact, there had been no forfeiture.

At page 46 of its brief, Union points out that it made substantial improvements to the land. We readily concede that roads were built although we do not concede (and the trial court did not find) that they were worth approximately \$400,000.00.

Be that as it may, however, the fact that improvements may have been added to the property in no way affects the principles under which this case is to be decided. It can only affect the extent to which Union may be entitled to a refund of its payments.

Some comment may also be made on footnote 38 (page 44). In attempting to answer our contention that Union would not have sought to have the contract reinstated unless the present value of the property exceeded the amount remaining unpaid on the contract, Union argues that, by the same token, Ward would not have cancelled it had the present value of the property been less than the amount remaining to be paid. But, and this is a big "but", if the present value of the property had been less than the unpaid balance due under the contract, Ward would not have had the right, which a vendor ordinarily has, of suing for that balance. He would have been left to his sole remedy of retaking possession of the land and suffering the consequences of the decrease in its value. He would not have received the \$750,000 which Union describes as the benefit of his bargain.

In the last paragraph of this section of its brief (page 47), Union asserts that a termination of its rights under the contract and in the land would have resulted in the most outrageous forfeiture.

Which we shall answer simply by asking this court to read the immediately preceding paragraph of Union's brief (that which begins at the bottom of page 46). It is there in effect recognized that there would have been no forfeiture if the trial court had granted to Union the relief (by way of restitution) to which Ward readily conceded at the trial that Union might be entitled.

We are thus brought back to the basic issue in this case which is not, as Union would have this court believe, whether the judgment should be affirmed or Union should be denied all relief, but

is merely whether Union is entitled to the relief which the trial court gave it or only to relief by way of restitution.

Union next contends that paragraph 12 is inconsistent because it allegedly gives Ward the right to cancel as well as the right to enforce the contract. Specifically, Union claims that the provision allowing Ward to recover the value of the unpaid logs is inconsistent with the balance of paragraph 12.

That contention is untenable.

Paragraph 12 was intended to achieve two objectives: To protect Union against liability for damages or for the balance of the purchase price in the event that it could not or chose not to complete the contract and at the same time to protect Ward against loss in the event that he had to take the property back.

In order to achieve the latter objective, paragraph 12 provides that, in the event of the termination of the contract, Ward shall be entitled to (1) the land in such logged-over condition as Union may choose to leave it and (2) the payments previously made by Union (which represent in part the value of logs which Union removed) and (3) the value of the unpaid logs.

It may be that, as we have already recognized, the provision for the retention of the payments previously made by Union is unenforceable to some extent. This does not mean, however, that the various provisions of paragraph 12 are inconsistent. In fact, they are not as they all are intended to achieve the same objective, namely, to give back to Ward the land which is his and the value of the logs which Union removed from that land.

The example which we previously gave in this brief will best demonstrate that the remedies provided by paragraph 12 are not inconsistent. Union could have begun heavy logging as soon as it had made the initial payment of \$65,000 and could have logged for three or four months without paying. It could have removed \$200,000 or \$300,000 worth of logs (not to mention the waste that it could have committed while logging) before Ward could cancel the contract for its failure to pay for the logs removed

during the first month. Under those circumstances, it certainly could not be argued as a defense to an action for the value of those logs that the remedy was inconsistent with termination of the contract.*

The cases cited by Union are all distinguishable particularly in view of the fact (which we must again emphasize) that Ward does not seek to enforce all of the terms of paragraph 12 but seeks only to retain so much of the money which Union paid and to collect so much of the money still owing and unpaid as will not penalize Union. As we have already had occasion to demonstrate, that is a right which the law gives him independently of paragraph 12.

In other words, we concede that Ward is entitled to no more than the land and the value of the logs removed from the land and that Union was entitled to relief (unless precluded by the doctrine of unclean hands) in the event that it was able to show that the cancellation of the contract resulted in a penalty and forfeiture.

Under the circumstances, and in view of that concession, the cases cited by Union need not detain us.

None of them holds that a vendor of timber land who regains possession of the land in a depleted and logged over condition is not entitled to recover the value of the logs which the vendee removed while he was in possession.

*It may be well to note that Wilson testified at the trial and now argues in his brief that Ward knew, in 1946, that he was in a financially precarious position (comparatively speaking at least) and understood that payments on the contract would have to be made out of the logs removed from the land. Under the circumstances, any provision that gave Ward less than what paragraph 12 gave him would have been extremely unwise.

In fact, it would seem that, under those circumstances, paragraph 12 was most fair to Wilson since it protected him against some of the risks with which he would have been faced had he bound himself to pay the entire purchase price.

- (5) **No election of remedy was made by Ward as none was available to him. On the contrary, Ward sought the "sole remedy" available to him.**

Union contends that, by obtaining a writ of attachment under the third cause of action of his cross-complaint (in which he sought to recover money due him for logs removed and taxes), Ward made an election of remedies and waived the prior cancellation of the contract.

We have of course already demonstrated that there was nothing inconsistent in the various steps which Ward was entitled to take. Hence, his taking one of them could not waive the right to take another.

It is our position that Ward was entitled to the money for which he sued, that his right thereto arose under the contract but was not extinguished by its cancellation. It matters not whether, after the cancellation, it continued as an express or became an implied obligation on Union's part. The point is that, express or implied, it continued to be an obligation, that Ward was entitled to enforce it* and that, to do so, he had the right to a writ of attachment under Section 537 of the Code of Civil Procedure of the State of California and Rule 64 F.R.C.P.

There would seem to be no doubt that Ward is entitled to have the unpaid logs and the taxes credited against any money found to be due to Union by way of restitution. Nor can there be any question as to his right to collect for the logs. If, however, the contract did not give him the right to recover unpaid taxes, his attempted enforcement of that "right" could not constitute an election of remedies or a waiver of his right to terminate the contract.

Agar v. Winslow, 123 Cal. 587, 590-1, 56 Pac. 422;

Dickinson v. Electric Corp., 10 Cal. App. 2d 207, 211-12, 51 P.2d 205 (hearing denied);

De Hart v. Allen, 49 Cal. App. 2d 639, 646, 122 P.2d 273 (hearing denied).

*It certainly was not necessarily apparent at the time the cross-complaint was filed (in fact, it is not necessarily apparent yet) that Union *will* be entitled to a refund. We merely recognize that it may be.

In the *Dickinson* case, the court held that the fact that the lessor had retaken possession of the premises and notified the lessee that he would relet for his account would normally have amounted to an election of remedies and precluded the lessor from suing for rent. Because the lease provided, however, that repossession and reletting would not operate as a termination of the lease unless the lessor so elected, the court held that the lessor was entitled to recover accrued rental under the lease.*

Similarly, in this case, Ward was entitled—as far as the rules as to election of remedies were concerned—to seek all the remedies (assuming there were more than one) provided for by the contract. He was accordingly entitled to a writ of attachment in connection with his money claim.

The cases cited by Union are all distinguishable.

In *Neet v. Holmes*, 25 Cal. 2d 447, 154 P.2d 854, for example, the lessor of a mining lease gave notice of rescission and thereafter continued for two years to accept the royalties due him thereunder. The court held that he had thereby waived his right to rescind.

It must be noted that the court did not hold that, if he had refused to accept the royalties, he would not have been entitled to compensation for the minerals removed from the mine by the lessee.

That he would have been entitled to such compensation is made clear by another case cited by Union, *Kern Sunset Oil Co. v. Good Roads Oil Co.*, 214 Cal. 435, 6 P.2d 71. In that case, the court held that the acceptance by the lessor of royalty payments under the lease up to and including three months after the commencement of the action was a waiver of his right to terminate the lease. At page 446, however, the court made it clear that, instead of accepting the royalties under the lease, the lessor could and should have made claim to the entire proceeds

*As a separate point involving another step taken by the lessor, the court also held that an attempt to assert a right which does not exist does not amount to an election of remedies.

from the sale of the oil. In other words, the court recognized that, if the forfeiture of the lease was justified, the lessor was indeed entitled to all of the proceeds from the oil. Had he sued for those proceeds, he would have been entitled to a writ of attachment.

Similarly, in this case, Ward was entitled to be paid for the logs whether his right to be paid arose under the contract or was implied by law upon its termination. In either case, he was entitled to a writ of attachment.*

Steiner v. Rowley, 35 Cal. 2d 713, 221 P.2d 9, another case relied upon by Union, is not to the contrary. The court held that the plaintiff, who had obtained a writ of attachment in support of the contract counts of his complaint under which he sought to recover \$2,000, was not entitled to recover exemplary damages (in addition to the \$2,000) on another count of his

*As against a nonresident (such as Union), Section 537(2) of the Code of Civil Procedure of California allows an attachment in actions on contract, express or implied, regardless of whether the plaintiff has other security. As far as material, Section 537 provides as follows:

"§ 537. [When and actions in which attachments may issue.] The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

"1. [*Unsecured claims on contract.*] In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; provided, that an action upon any liability, existing under the laws of this State, of a spouse, relative or kindred, for the support, maintenance, care or necessities furnished to the other spouse, or other relatives or kindred, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section.

"2. [*Contract actions against nonresidents.*] In an action upon a contract, express or implied, against a defendant not residing in this State, or who has departed from the State, or who cannot after due diligence be found within the State, or who conceals himself to avoid service of summons."

complaint based on fraud. In effect, the court held that, since an attachment is not available in an action to recover exemplary damages, the plaintiff, who had obtained an attachment, had to give up his attempt to recover such damages. In this case, however, the remedy of attachment was available to Ward regardless of the theory under which he proceeded.

(6) Union was not entitled to the relief which the trial court gave it. The decree was not one of strict foreclosure. In any event, under the law of California, a decree of strict foreclosure cannot be granted in a case in which a time of the essence contract was cancelled by the vendor for a wilful breach by the vendee except if the vendor himself requests such a decree.

Union next contends that the judgment can and should be affirmed even though its defaults were wilful.

Union does not flatly take the position (which the trial court took) that the recent California cases dealing with relief from forfeiture form an adequate basis for the judgment. In fact, its position as to those cases is rather equivocal. At page 55 of its brief, Union states that the judgment can be supported by *Freedman v. The Rector*, supra, alone. At page 56, however, it states that the judgment is not a form of relief which originated with or is directly dependent upon the line of recent California cases to which *Freedman v. The Rector*, supra, belongs.

Instead, Union takes the position that the judgment can be supported as a judgment of strict foreclosure granting relief to Ward conditioned on Union's failure to pay the balance of the purchase price rather than as a judgment granting relief to Union.*

Conceding for a moment that a judgment of strict foreclosure could have been rendered in this case, it must first be pointed out that this was not such a judgment.

A judgment of strict foreclosure would have given Union a certain time to pay or be foreclosed. It would not have given

*It would almost seem as if Union is in doubt as to the soundness of the decision of the trial judge for how else can we explain its attempt to uphold the judgment on so many theories other than the theory which the trial judge adopted.

Union what this judgment also gave it, namely, the right to a refund of part of its payments in the event that it could not raise the necessary funds *or* in the event that it did not choose to pay at the expiration of the 45 days provided for by the judgment.

If a fire had destroyed the timber on the land during the 45 day period, Union would have been entitled, under this judgment, to ask for the restitution of the excess, if any, of its payments.* It cannot be denied that the latter form of relief certainly did originate with and is directly dependent upon the *Barkis*† line of cases. Moreover, it is not available to the vendee as part of a judgment of strict foreclosure.

In fact, however, whatever may be the rule in other jurisdictions, a judgment of strict foreclosure could not have been rendered in California in a case such as this.

This is a case in which the parties agreed that the contract could be cancelled in the event of the vendee's default and in which the contract was in fact cancelled on account of such a default. This is not a case in which the vendor asked the court to cancel (foreclose) the contract.

In fact, the parties expressly provided (by including a cancellation clause in their contract) that the vendor would not have to go through a judicial proceeding in order to be protected against the vendee's defaults.

This is not merely a question of who filed suit first. The contract made it unnecessary for the vendor to file suit. Thus, if he does file suit to quiet his title after the cancellation of the contract, as Ward did in this case by way of his cross-complaint, he is not asking the court to alter the status of the parties but merely to declare it.

Crowell v. City of Riverside, 26 Cal. App. 2d 566, 582, 80 P.2d 120;

Shaw v. Guaranty Liquidating Corp., 67 Cal. App. 2d 660, 663; 155 P.2d (hearing denied).

*This incidentally points out another reason why the judgment is erroneous. It gives the wilfully defaulting vendee a choice of relief. The choice, if any is available, should be given to the vendor.

†*Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367.

It is true that, under certain circumstances (when the cancellation would result in a forfeiture), a court of equity will grant relief to the vendee. What Union is actually asking for in this case, however, is that the court rewrite the contract, pretend that it was not cancelled and thus compel the vendor to be the one who seeks relief. This, equity will not do.

Glock v. Howard, 123 Cal. 1, 9, 55 Pac. 713;

Pitt v. Mallalieu, 85 Cal. App. 2d 77, 86, 192 P.2d 24;

Landfield v. Cohen, 89 Cal. App. 2d 177, 180, 200 P.2d 149 (hearing denied).

In the latter case, while denying relief to the vendee less than ten years ago, the court forcefully stated at page 180:

“Business transactions are not to be transmuted into amusement devices by the aid of judicial decrees. They are hedged about by legal rules and equitable principles, but unless those rules and principles are transgressed the law authorizes no interference by courts with the acts of the participants. To do so would constitute an interference with the freedom of contract, the boast of our economy, our culture, and our jurisprudence.”

Again, we recognize that provisions for relief are now available but this does not mean that the contract cannot be cancelled, it only means that there may be *relief* from the cancellation.

Even in the event of a cancellation pursuant to the terms of the contract, the vendor is required to do equity if he is interested in having the court declare that the contract was cancelled. As pointed out in *Freedman v. The Rector*, *supra*, Section 3369 of the Civil Code precludes the court from quieting his title unless he refunds the excess of the vendee's payments over the damages caused by the vendee's breach. It is significant, however, that a refund of the excess of the payments is all that the court referred to as a prerequisite to the granting of a decree quieting the vendor's title.

The theory behind a decree of strict foreclosure is that a court of equity will not *terminate* the rights of the vendee (it will not

grant that form of relief to the vendor) without giving him an opportunity to pay. In this case, however, the contract was terminated before the parties ever got into court.

Although strict foreclosure is a form of relief available to the vendor, we do not mean to say that a court of equity will decree a strict foreclosure only when the vendor asks for it. There are indeed cases in which the vendor sought other relief (such as a decree quieting his title without giving the vendee either a refund or an opportunity to complete the contract) and in which the court rendered a decree of strict foreclosure at the instance of the vendee thus giving him the opportunity to complete the contract which the vendor sought to deny him.

The point is, however, that all the cases in which a strict foreclosure was thus imposed upon the vendor contained distinguishing features: In some of them, time was not of the essence. In others, there was a waiver of the time of the essence provision. In still others, there was no wilful breach.

Union argues that it does not usually appear in strict foreclosure cases whether time was made of the essence. We know of no case in which strict foreclosure was granted against the wishes of the vendor and in which it appears that time was of the essence. There are several such cases, however, in which it does appear that time was *not* of the essence.

For example, in *Keller v. Lewis*, 53 Cal. 113, which, as Union itself points out, is one of the leading cases on the subject, the basis of the argument made by prevailing counsel (for the vendee) was that time was *not* of the essence. The court held that the vendor was not bound to wait indefinitely for the vendee to perform under the terms of the contract. It fixed a deadline for him to comply (in effect, it made time of the essence) and thus made possible a cancellation of the contract in the event of his failure to do so. Unlike the vendor in this case, however, the vendor in *Keller v. Lewis*, *supra*, could not have cancelled the contract without judicial intervention.

The fact, which Union emphasizes, that some of the cases in which it does not appear that time was of the essence rely on *Hansbrough v. Peck*, 72 U.S. 497, 18 L.ed. 520, a case in which time was made of the essence, cannot be too important in view of the fact that *Keller v. Lewis*, supra, in which it does appear that time was not of the essence, also cites and relies on *Hansbrough v. Peck*, supra.

We are yet to find a case in which the vendee succeeded in having the court decree a strict foreclosure against the wishes of the vendor and in which the contract contained a cancellation clause in the event of default by the vendee. In *Veterans' Welfare Board v. Burt*, 4 Cal. App. 2d 659, 41 P.2d 587, a case in which, according to Union, the vendor was authorized by a State statute to cancel the contract in the event of the vendee's default, the trial court did *not* decree a strict foreclosure and the judgment was affirmed on appeal as against the vendee's contention that he should have been given some time within which to complete the contract.

Finally, we are yet to find a case in which strict foreclosure was decreed at the instance of the vendee and against the wishes of the vendor and in which the breach by the vendee was wilful.

Union argues that the question of wilfulness is never an issue in strict foreclosure cases and that, in fact, it is often apparent that the breach involved in those cases would have been found to be wilful if wilfulness had been an issue. In support of that proposition, Union refers to *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283. This, however, was an action brought by the vendor "to obtain a decree declaring and adjudging that defendant had failed to perform his part of a contract for the purchase * * * of certain real property of plaintiff, fixing a time within which he should so comply, and decreeing that if he did not so comply within said time he should be forever foreclosed of all right or interest in the property or to a conveyance thereof" (167 Cal. at 595).

In other words, strict foreclosure was all that the vendor sought in that case and that is what the court gave him but the case certainly does not stand for the proposition that a wilfully defaulting vendee in a contract in which time is of the essence can insist upon being allowed to complete the contract.

In *Wilson v. Beazley*, 186 Cal. 437, 199 Pac. 772, upon which Union similarly relies, the court held that, because there was no privity between him and the assignee of the vendee, the vendor was not entitled to specific performance (the remedy which he sought). Instead, the court directed that a judgment of strict foreclosure be entered requiring the assignee to pay the balance due within a reasonable time and terminating his rights in the event of his failure to do so.

It appears from the opinion that the land was worth \$4,000 and that the balance due on account of the purchase price was \$4,726.95. That was of course the reason why the vendor was more interested in the purchase price than the property.

The case certainly does not stand for the proposition, as Union would have this court believe, that the wilfully defaulting assignee of the vendee (or the wilfully defaulting vendee) may insist upon the right to complete a contract which the vendor has justifiably terminated.

The case of *Petersen v. Ridenour*, 135 Cal. App. 2d 720, 287 P.2d 848, upon which Union also places strong reliance not only does no violence to any of the foregoing principles, but in fact strongly supports our position.

The case involved an obviously innocent mistake on the part of the vendee in addition to some equally obvious elements of waiver on the part of the vendor.

The court first restated the rules relating to relief from forfeitures announced in the recent California cases cited in our opening brief. Citing *Bird v. Kenworthy*, *supra*, it pointed out that there can be no relief from a forfeiture without a showing by the vendee as to the value of the property at the time of the default as well as the value of its use while it was in his possession.

Although the vendee had not made such a showing, the court nevertheless concluded, and rightly so, that, under the circumstances of the case, equity could not allow the vendee to lose his home without an opportunity to pay the amount due. For a period of four years, he had made payments which he thought were proper and which were accepted by the vendor. Suddenly, however, the vendor demanded large additional payments and gave notice of default. The court in effect held that the vendor had waived the time of the essence provisions of the contract and could not reinstate them without reasonable notice to the vendee. The court stated at page 729:

“Though the evidence was ineffective for the purpose of varying the terms of the contract, defendant’s testimony that he was told and believed that the \$100 monthly payments would include all interest, taxes and insurance, has a legitimate bearing upon this question of what the equities were in the matter of giving him an opportunity to cure his defaults—especially when it is considered in the light of plaintiffs’ own understanding and his acceptance, without interest and without a murmur, of defendant’s payments, which were first declared inadequate on August 10, 1952, almost four years after the payments began. * * * Defendant said in his answer that he would pay any adjudged deficiencies. Though there was no plea of waiver or estoppel, the facts above reviewed made it legally impossible for plaintiffs to take snap judgment on defendants and thereby to forfeit their interest without any previous opportunity to make good—to save their home. (See *Boone v. Templeman*, 158 Cal. 290, 294-295 (110 P. 947, 139 Am. St. Rep. 126); *McCartney v. Campbell*, 216 Cal. 715, 720 (16 P.2d 729); *Gonzales v. Hirose*, 33 Cal. 2d 213, 216 (200 P.2d 793); *McLane v. Van Eaton*, 60 Cal. App. 2d 612, 616 (141 P.2d 783); 66 C.J. par. 383, p. 782.)”

This court will note that all the cited cases (and they are the last cases cited in the opinion) were waiver cases.

The superseded opinion of the Supreme Court of California in *Weil v. Barthel*, 279 P.2d 544, merely held that a decree in a previous action was a decree of foreclosure by sale (as contended

by the vendee) rather than a decree of strict foreclosure (as contended by the vendor) and that, under an applicable California statute, the vendee was entitled to a period of redemption. We do not believe that the opinion can be relied upon for any purpose (see *Miller & Lux Inc. v. James*, 180 Cal. 38, 48, 179 Pac. 174; *Hopkins v. Southern California Teleph. Co.*, 275 U.S. 393, 400, 72 L.ed. 329) but, if it can be relied upon, it is for the proposition that there can be no redemption unless allowed by statute.

In this case, there is no statute other than Section 3275 of the Civil Code of which Union could attempt to avail itself to effect a "redemption." Since its breach was wilful, however, it cannot claim relief under that section.

In the final analysis, the conclusion is inescapable that, whatever may be the scope of the availability of strict foreclosure as a remedy to the vendee, it cannot be available to him, as contended by Union, in all cases of default. If the vendee were allowed in all cases to complete the contract by way of a strict foreclosure, there would be nothing left of Sections 3275 and 1492 of the Civil Code. Moreover, if he were entitled to insist on strict foreclosure in all cases, there would have been no need for the Supreme Court to develop the *Barkis* line of cases.

We argued at length in our opening brief that Union had come into court with hands so unclean that it should have been denied all relief. Union has in no way attempted to answer that argument except of course by attempting to show that its defaults were not wilful. We must accordingly assume that it concedes that, if this court agrees with our evaluation of the evidence, it should be denied all relief.

It may be too that relief should be denied Union on an entirely different basis. In view of the provisions of paragraph 12 of the contract, specific performance could not have been granted Ward against Union. The doctrine of mutuality of remedy should preclude Union from getting relief so akin to specific performance.

Sturgis v. Gallindo, 59 Cal. 28, 32;

Dabney v. Key, 57 Cal. App. 762, 765, 207 Pac. 921;
Moore v. Heron, 108 Cal. App. 705, 709, 292 Pac. 136;
George v. Weston, 26 Cal. App. 2d 256, 263, 79 P.2d 110
 (hearing denied).

We have it deemed unnecessary to lengthen this brief with an analysis of the cases from other jurisdictions which Union cites in the last section of its brief. The law of California seems so clear to us that it matters not whether cases from other jurisdictions are distinguishable on their facts.

We stand squarely on the law of California and particularly on the case of *Crofoot v. Weger*, 109 Cal. App. 2d 839, 241 P.2d 1017, which Union has so far been unable to distinguish.*

CONCLUSION

The argument that a person who has paid \$585,000 on account of a \$750,000 purchase should be allowed to complete his contract is obviously appealing and obviously appealed to the court below.

As applied in this case, however, it forced the trial court to ignore altogether the rules of law which should have governed its decision and to disregard cases such as *Crofoot v. Weger*, supra, in much the same way as Union was forced to disregard it in its brief.

As applied in this case, the argument also does violence to the true equities of the situation. Union admittedly removed over 90 million feet of logs on which it made a net profit as high as \$20 or \$25 per thousand feet. Because the trial judge did not care to hear testimony on the subject (683-692), the record does not show the total profit that was made on the operation but it is obvious that Wilson and the various companies which he controls must have received benefits far in excess of the \$585,000 that were paid to Ward. In addition, some 48 million feet of redwood timber

*We stand too on *Palmer v. McArthur*, 99 Cal. App. 510, 514, 278 Pac. 1049, a case which we discovered only after the filing of our opening brief and in which, in an action to quiet title by the vendor, the court refused all relief to the vendee whose defaults were found to have been wilful and affirmed the judgment quieting the vendor's title.

that were on the land on May 1, 1946, are unaccounted for. We assume that that timber was destroyed in the course of wasteful logging rather than removed and left unreported. But the fact remains that it is no longer on the land.

Thus, the equities of the situation are far less one sided than may appear at first, assuming that they are one sided at all.

Someone stands to profit from the ultimate decision in this case since the land is worth more than the balance due on the contract. The question is as to who, in equity, should get the profit, the wilfully defaulting vendee or the innocent vendor.

Sometimes, in hardship cases—for example, when a house is about to be lost—a court will strain itself, the facts and the law to reach a decision that will result in saving that home for the family which lives there. But never to insure a profit to a wilful wrongdoer. And particularly not, as was done in this case, to insure him a profit if, at the time of judgment, the value of the property has gone up and insure him against loss if the value has gone down.

We respectfully and earnestly urge this court to consider this case on the basis of the rules of law and equity presented to the trial court and upon which it sought to base its decision. If we are right, as we believe that we are, in our understanding of those rules, the judgment should be reversed with instructions to the trial court to either (1) enter judgment quieting title in Ward and awarding him so much of the amount claimed in his cross-complaint as is proper or (2) try the issue of unjust enrichment under the rules laid down in *Bird v. Kenworthy*, supra, and quiet Ward's title on condition that he refund to Union such amount, if any, as would leave him unjustly enriched if he were to retain it.

Dated: Oakland, California

September 7, 1956

Respectfully submitted,

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Attorneys for Appellants

No. 14,996

In the

United States Court of Appeals

For the Ninth Circuit

HAROLD L. WARD, et al.

Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corporation,

Appellee.

Appellants' Petition for a Rehearing

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FILED

MAY 17 1957

PAUL P. O'BRIEN, CLERK

SUBJECT INDEX

	Page
Grounds for a Rehearing.....	1
Argument	2
(1) The Court Completely Ignores Crofoot v. Weger and the Rule Which That Case Announces.....	2
(3) The Court Completely Ignores Bird v. Kenworthy and the Rule Which That Case Announces.....	4
(3) The Cases Relied Upon by This Court Are Altogether Dis- tinguishable	6
Conclusion	7

TABLE OF AUTHORITIES CITED

CASES	Pages
Baffa v. Johnson, 35 Cal. 2d 36, 216 P.2d 13.....	4
Barkis v. Scott, 34 Cal. 2d 116, 208 P.2d 367.....	3
Bird v. Kenworthy, 43 Cal. 2d 656, 277 P.2d 1.....	2, 4, 5, 8
Crofoot v. Weger, 109 Cal. App. 2d 839, 241 P.2d 1017.....	1, 2, 3, 5, 8
Freedman v. The Rector, 37 Cal. 2d 16, 230 P.2d 269.....	2, 4, 6
Petersen v. Ridenour, 135 Cal. App. 2d 720, 287 P.2d 848.....	2, 6
Weil v. Barthel (Cal.) 279 P.2d 544.....	2, 6
West v. American Telep. & Teleg. Co., 311 U.S. 223, 236-237, 85 L. ed. 139.....	2
Wuchner v. Goggin, 175 F.2d 261.....	2

STATUTES

Civil Code, section 3275.....	2, 3
-------------------------------	------

“But where, as here, the vendor would have received greater benefit if the property had remained in his hands than the amount obtained by him because of the forfeiture, there is no inequity.”

Bird v. Kenworthy, 43 Cal. 2d 656, 660, 277 P.2d 1.

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Appellants respectfully petition for a rehearing.

GROUND FOR A REHEARING

The court misunderstood, misconstrued and misapplied the law of California in the following crucial respects:

(1) The court completely ignored the California rule that relief by way of reinstatement cannot be given a wilfully defaulting vendee. In fact, the opinion does not even mention *Crofoot v. Weger*, 109 Cal. App. 2d 839, 241 P.2d 1017, the leading case on that point.

(2) The court completely ignored the California rule that no relief can be given a defaulting vendee unless the termination of the contract is shown to have resulted in a

forfeiture. In fact, the opinion does not even mention *Bird v. Kenworthy*, 43 Cal. 2d 656, 277 P.2d 1, the leading case on that point.

ARGUMENT

In effect, the court holds that, under the law of California, a defaulting vendee is entitled to reinstatement of the contract under any and all circumstances (regardless of whether his default was wilful and regardless of whether the termination of the contract resulted in a forfeiture).

To reach that decision, the court relies upon what it describes as firmly established principles of American jurisprudence and inherent powers of a court of chancery as well as upon inferences which it draws from three California cases (*Freedman v. The Rector*, 37 Cal. 2d 16, 230 P.2d 269, *Petersen v. Ridenour*, 135 Cal. App. 2d 720, 287 P.2d 848, and *Weil v. Barthel* (Cal.) 279 P.2d 544).

What is significant, however, is that it completely ignores three cases which are in point: *Crofoot v. Weger*, supra, *Bird v. Kenworthy*, supra, and its own decision (authored by Judge Stephens) in *Wuchner v. Goggin*, 175 F.2d 261.

What we are concerned with in this case is not a principle of American jurisprudence or an inherent power of a court of chancery. We are concerned with rules of California law, rules which this court must follow even though it considers them unsound (*West v. American Telep. & Teleg. Co.*, 311 U.S. 223, 236-237, 85 L. ed. 139), rules which give this court no choice but to reverse the judgment.

(1) The Court Completely Ignores Crofoot v. Weger and the Rule Which That Case Announces.

As we have from the beginning, we recognize that relief may be given a defaulting vendee outside of the provisions of section 3275 of the Civil Code. This does not mean, how-

ever, that all of the relief which is available to a nonwilfully defaulting vendee under that section is available to a wilfully defaulting vendee independently of that section. On the contrary, section 3275 expresses a legislative intent that a wilfully defaulting vendee should *not* be entitled to all of the relief to which a nonwilfully defaulting vendee may be entitled.

That such is the law was made clear in *Crofoot v. Weger*, supra, the one California case which considered the question of the relief available to a defaulting vendee in the way in which that question was raised in this case.*

Yet this court does not even mention that case in its opinion.

In *Crofoot v. Weger*, supra, the court expressly instructed the trial court to determine whether the default was wilful or not and to reinstate the contract only if the default was found not to have been wilful.

At page 842 of 109 Cal. App. 2d, the court stated:

“Likewise the trial court could have found that the loss suffered by the appellants when the respondents terminated the contract was a forfeiture or a loss in the nature of a forfeiture, and such findings, coupled with findings that the breach was neither wilful nor the product of gross negligence would have made proper a reinstatement of the contract upon equitable conditions, if that were still possible, and if not then the recovery by the appellants of such amounts of the payments made as lay within the area of forfeiture.

“In addition to the foregoing, if the court had found that the breach was wilful or grossly negligent so as to prevent equitable relief under section 3275 of the Civil Code there was still the duty of the court to go

*It was also made clear by the earlier case of *Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367, in which the court found it necessary to reverse the finding that the defaults were wilful in order to grant the vendee relief by way of reinstatement of the contract.

further and find whether or not the termination of the contract by the respondents for the appellants' default resulted in the unjust enrichment of the respondents. If such were the result then it would have been the duty of the court to give judgment for so much of the funds paid in as constituted unjust enrichment."

The *Crofoot* case is in point. It is a square holding on the subject, one that is subsequent to the decision in *Freedman v. The Rector*, supra (in fact, it is the last decision on that particular point), and one that is binding upon this court.

And if this court believes that it is not bound thereby, the parties to this action are at least entitled to be told why.

(2) The Court Completely Ignores *Bird v. Kenworthy* and the Rule Which That Case Announces.

This court similarly ignores *Bird v. Kenworthy*, supra, the leading California case holding that there can be no penalty or forfeiture so long as the vendee received more than he paid for.

The trial court at least mentioned it in a footnote but this court does not even deem it necessary to go that far. It relies upon what it describes as "the very teaching of the doctrine of the *Freedman* case" but its decision is contrary to the very teaching of the doctrine of the *Bird* case.

In this case, the termination of the contract could have resulted in a penalty or forfeiture only if the value of the use of the land while Union was in possession and the value of the timber which it removed were less than the \$585,000 which it paid (coupled with the value of its improvements to the land).

But there was no showing whatsoever (and, on that issue, the burden of proof was upon Union (*Baffa v. Johnson*, 35 Cal. 2d 36, 216 P.2d 13)), either as to the value of the use of the land while Union was in possession or as to the value of the more than 90 million feet of timber which it removed.

Hence, no forfeiture was shown from which Union was entitled to be relieved. This court simply *assumed* that there was one.

It should be noted that *Crofoot v. Weger*, *supra*, requires the trial court to *find* that there was a forfeiture before relief can be granted.

It should be noted too that this court altogether failed to pass upon, although it does mention, the last of our specifications of errors, namely, that no forfeiture could be found to have resulted from the termination of the contract in the absence of (1) a finding as to whether the amount paid by Union exceeded the damages sustained by Ward and (2) a finding as to the reasonable value of the use of the property during the eight years during which Union was in possession.

This court holds that the trial court was justified in giving Union relief by way of reinstatement of the contract because it had the inherent power to order a judicial sale of the property. What this court fails to note, however, is that a judicial sale could similarly have been ordered and that it was not ordered in the *Bird* case.

Instead, the vendor, who would have received only \$29,000 had the vendee completed the contract, was allowed to retain a total of \$52,000 as a result of the vendee's default.

He was obviously enriched yet the court held that he was not *unjustly* enriched.

It must be emphasized that the *Bird* case *was* a case in which the vendee sought to be relieved from a forfeiture. It *was* a case in which the vendee invoked the equitable powers of the court and in which, after citing a number of other equity cases, the court held that he was not entitled to any equitable relief.

Under the terms of the contract, the vendor, in *Bird v. Kenworthy*, *supra*, was entitled only to another \$5,000. He

was also entitled to recover such damages as he had suffered as a result of the vendee's default. Had the property been sold, he would have received those damages as well as the amount due him under the contract (in other words, he would have received the benefit of his contract) and the balance would have been refunded to the vendee.

Instead of ordering a judicial sale, however, the court allowed the vendor to retain the property (worth \$28,000) without making any restitution to the vendee.

How can it be said in the light of that case that, since it could have ordered a judicial sale of the property in this case, the trial court was justified in reinstating the contract?

(3) The Cases Relied Upon by This Court Are Altogether Distinguishable.

The opinion relies upon what it describes as the teaching of the doctrine of the *Freedman* case (even though it recognizes that the facts in that case were entirely dissimilar).

It is true that, in that case, the parties were made whole by allowing a restitution. The point is, however, that *they were made whole as if there had been no contract not as if the contract had been performed.*

Although the benefit of his bargain (the increase in the value of the real property) could not be given the vendee by way of specific performance (since the property had been sold), it could still have been given him by way of damages. This, the Supreme Court of California, expressly refused to do.

The case of *Petersen v. Ridenour*, *supra*, is similarly distinguishable since, as was pointed out in our reply brief, it involved nonwilful defaults and, in any event, was decided on the basis of a waiver of those defaults by the vendor.

As we also pointed out in our reply brief, the superseded opinion of the Supreme Court of California in *Weil v. Bar-*

thel, supra, merely held that a decree in a previous action was a decree of foreclosure by sale rather than a decree of strict foreclosure and that, under an applicable California statute, the vendee was entitled to a period of redemption. We do not believe that the case can be relied upon as a "useful guide" to anything but, in any event, it is certainly not a guide to what the trial court and this court have done in this case.

CONCLUSION

Despite the absence of any evidence on the subject, this court unequivocally states that Union's equity in the property far outweighs the equity of Ward. It also states that the relief sought by Ward was nothing short of a strict cancellation and forfeiture of the contract and of Union's equity in the property.

Although we have never conceded and do not now concede that Union's equity now outweighs that of Ward (it must be remembered that Union removed over 90 million feet of logs on which it made a huge profit), we have at all times conceded that Union may be entitled to some relief by way of restitution.

We thought that we had made our position clear on that subject but the opinion in no way recognizes that such is our position and in fact makes it appear that, according to us, the only choice open to the trial court was either to deny Union all relief or to give it all of the relief for which it prayed and allow it to complete the contract.

Such was not the only choice open to the trial court or to this court. The crucial contention which we raised and which this court by-passes was that, even if Union was entitled to relief, the only relief which the trial court had the power to give it was relief against Ward's unjust enrichment by way of restitution of part of its payments.

Thus, a rehearing must be granted not only because the opinion of this court is in flat conflict with the decision in *Crofoot v. Weger*, supra, as well as with the very teaching of the doctrine of *Bird v. Kenworthy*, supra, but also because it fails to pass upon one of the crucial issues raised by appellants.

In fact, the questions presented by this case appear to us to be of sufficient importance to justify our suggesting, in accordance with Rule 23, that the case be reheard *en banc*.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,

May 16, 1957.

CYRIL VIADRO,

*Of Counsel for Appellants
and Petitioners.*







